Supreme Court, U.S.
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No. 10-

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IN THE

Supreme Court of the United States

FRANK S. EVANSON, individually and in his official capacity as a police officer of the Township of Cranberry,

Petitioner,

v.

SARA R. REEDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is the existence of probable cause in, and qualified immunity for, an arrest warrant under the Fourth Amendment to be determined on the arresting officer's motion for summary judgment by viewing the historical facts of the warrant's affidavit from the perspective of an objectively reasonable police officer or from the contrary view most favorable to the arrestee, after the historical facts have been established by adjusting the warrant's affidavit for misstatements and omissions based on a review of the evidence in the light most favorable to the arrestee?

(2) Should qualified immunity be restricted primarily to situations requiring difficult, split-second decisions, and denied for a mistaken arrest when there was an objectively reasonable basis for the arresting officer to believe that probable cause existed under the Fourth Amendment to make the arrest?

(3) Does a police officer, who reasonably suspects a complainant's criminal behavior, credibility, and recent drug use, violate the Fourth Amendment by requesting a hospital to test for drug use the blood sample that the complainant provided to the police as part of a rape kit, when the complainant voluntarily signed written consents that authorized not only the collection and testing of the blood, but also providing the blood sample and the test results to the police?

LIST OF PARTIES

In the Court of Appeals, respondent Sara Reedy was the appellant, and petitioner Frank Evanson was an appellee. Steve Mannell, individually and in his official capacity as the Public Safety Director of the Township of Cranberry, and Kevin Meyer, individually and in his official capacity as a police officer of the Township of Cranberry, were also appellees, but the Court of Appeals affirmed the summary judgment that the District Court had entered in their favor.

In addition, 39 organizations filed a brief as *amici curiae* in support of respondent Sara Reedy. Led by the Women's Law Project, the organizations included: A Woman's Place Civil Legal Assistance Program; Alle-Kiski Area HOPE Center, Inc.; Alice Paul House; American Civil Liberties Union and American Civil Liberties Union of Pennsylvania; Berks Women in Crisis; California Women's Law Center; Citizens Against Physical, Sexual & Emotional Abuse, Inc.; Connecticut Women's Education and Legal Fund; Crime Victim Center of Erie County; Crime Victims' Center of Chester County, Inc.; Day One; End Violence Against Women International; Feminist Majority Foundation and the National Center for Women and Policing; HAVIN, Inc. (Helping All Victims In Need); Hawaii State Coalition Against Domestic Violence; Huntingdon House; Legal Momentum; Legal Voice; National Center for Victims of Crime; National Crime Victim Law Institute; National Women's Law Center; Passages Inc.; Pennsylvania Coalition Against Domestic Violence; Pennsylvania Coalition Against Rape; Pennsylvania NOW; Pittsburgh Action Against Rape; Southwest Women's Law Center;

Victim Rights Law Center; Victims' Intervention Program; Victims Resource Center; Women Against Abuse; Women Organized Against Rape; Women's Center, Inc.; Women's Law Center of Maryland, Inc.; Women's Way; and YWCA of Lancaster.

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OPINIONS BELOW

The precedential opinion of the Court of Appeals has been officially reported at *Reedy v. Evanson*, 615 F.3d 197 (3d Cir. 2010). See Appendix A.

The District Court's opinion has not been officially reported, but it has been unofficially reported at *Reedy v. Evanson*, 2009 U.S. Dist. LEXIS 33319 (W.D. Pa., Apr. 20, 2009). See Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Court of Appeals filed its opinion and judgment on August 2, 2010. See Appendix A at 2a. Petitioner filed a timely petition for rehearing with the Court of Appeals on August 16, 2010, which the Court of Appeals denied on August 30, 2010. See Appendix D. Petitioner filed this petition for a writ of certiorari within the 90-day time frame established by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 United States Code, Section 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Respondent Sara Reedy sued petitioner Frank Evanson to obtain damages for two alleged violations of her civil rights under the Fourth Amendment and for associated state-law tort claims.[1]

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1. Reedy sued others, but those defendants were either dismissed or obtained summary judgment that was affirmed by the Court of Appeals.

The District Court had jurisdiction over Reedy's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and it had supplemental jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367.

2. Reedy's principal claims related to whether the affidavit on which Evanson obtained a warrant for Reedy's arrest established probable cause to reasonably suspect that (1) Reedy had stolen money from her employer's gas station convenience store when, among other facts, she had the apparent opportunity and motive to take the money, there was no tangible evidence that someone else took the money and sexually assaulted her, and the power to the store's security system had been disabled 20 minutes before Reedy said the robbery and assault occurred; (2) Reedy retained or disposed of the money in part by putting it toward the rental of a mobile home with her boyfriend, shortly after the money had been taken, so that they could move out of the car in which they had been living; or (3) Reedy filed a false sexual assault report to cover up the theft, when there was no corroborative evidence for the sexual assault claim, as there was for the theft charge.[2]

---

2. Under the Pennsylvania Crimes Code, "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, moveable property of another with intent to deprive him thereof." 18 Pa.C.S. § 3921(a). A person commits the crime of receiving stolen property "if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen ... unless the property is received, retained, or disposed with intent to restore it to the owner." *Id.* § 3925(a). A person commits the crime of false reporting if he "reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur[.]" *Id.* § 4906(b)(1).

Eventually, those charges were dropped several months later when the perpetrator of the robbery and the sexual assault of Reedy and of others across Pennsylvania was caught, in a state-wide investigation that Evanson had initiated with the Pennsylvania State Police, and confessed.

However, as Evanson contended and the District Court held, once the arrest warrant affidavit was reconstructed to cure the omissions and misstatements that Reedy contended had to be resolved in her favor on Evanson's motion for summary judgment, including the addition of another robbery/sexual assault under Evanson's jurisdiction and investigation known as the "Landmark attack," the core historical facts of the reconstructed affidavit established that probable cause and qualified immunity existed for Reedy's arrest when those facts were considered from the viewpoint of an objectively reasonable police officer, even if other officers of reasonable competence could disagree as to whether there was probable cause. Appendix C at 78a-79a, 81a-134a.

3. Reedy's other claims related to Evanson's requesting that the hospital, to which Reedy had been taken for medical examination in connection with her sexual assault claim, perform a drug-use screen of the blood sample that Reedy provided for police use as part of the rape kit for that claim. Evanson had probable cause to believe that the blood test would reveal that Reedy had used a controlled substance contrary to her denial of such use. In addition, Reedy had signed consent forms that not only allowed her blood to be drawn and tested by the hospital, but also allowed the blood sample and test results to be furnished to the police.

Reedy did not question the legality of the drawing of her blood sample or the legality of the warrant under which Evanson obtained the test results along with Reedy's other hospital records. Reedy did, however, challenge the sufficiency of the consent forms, and the testing of her blood without a warrant.

The "CONSENT FOR RAPE EXAMINATION" form that Reedy voluntarily signed expressly authorized Dr. Jones to perform a medical examination on her, to record "for the proper law enforcement agency" his findings, and further specifically authorized "the collection of necessary specimens for laboratory tests as related to my case." That consent also stated that any questions that Reedy "had regarding the procedure(s) have been answered to my satisfaction."

The "AUTHORIZATION FOR COLLECTION AND RELEASE OF EVIDENCE AND INFORMATION" form that Reedy also voluntarily signed expressly authorized Dr. Jones and "his medical and nursing assistants and associates" to do various things, including "the collection of other specimens and blood samples for laboratory analysis." Additionally, that form reflected that Reedy chose to "authorize the hospital and its agents to release the laboratory specimens, medical records and other information pertinent to this incident, including any photographs, to the appropriate law enforcement officials...."

Evanson argued and the District Court held that Reedy consented to have her blood drawn, tested, and given to the police. Additionally, once her blood was drawn for testing and police use, Reedy lost any

reasonable expectation of privacy in that blood sample. Furthermore, the requested screening fell within the scope of the authorization, and the tests were reasonable and conducted within a reasonable amount of time. Appendix C at 78a-79a, 135a-139a.

4. After the District Court granted Evanson's motion for summary judgment on all of Reedy's claims, Reedy appealed. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and reversed, except for the judgment entered on Reedy's intentional infliction of emotional distress claim, which it affirmed. Appendix A. Subsequently, the Court of Appeals denied Evanson's timely petition for rehearing. Appendix D.

5. In its analysis of the arrest warrant claim, the Court of Appeals further readjusted the historical facts of the warrant's affidavit. However, instead of viewing those facts from the objective perspective of a reasonable police officer, the Court of Appeals first chided the District Court for having "wrongly applied the summary judgment lens of 'all inferences in favor of the non-moving party,'" an approach that the Court of Appeals acknowledged was "deliberately slanted," instead of determining "with scrupulous neutrality" whether the warrant affidavit was false or misleading. Appendix A at 31a n. 24.

Nonetheless, the Court of Appeals then declared, with no supporting citation, that, once the review and correction process established the affidavit's historical facts, the corrected affidavit "simply becomes one more set of factual assertions that must then be viewed in the light most favorable to the non-movant, in the same

manner as all of the other evidence is to be considered at the summary judgment stage. The existence of a factual assertion in the corrected affidavit of course does not preclude other evidence pertaining to the same topic covered by that assertion from also being considered in the summary judgment process." Appendix A at 32a n. 24.

Consistent with that approach, but contrary to the established cases discussed below, the Court of Appeals proceeded with its own probable cause analysis, holding that the District Court's conclusion that probable cause existed under the reconstructed affidavit was mistaken, principally because the District Court "failed to consistently interpret the record in the light most favorable to Reedy and instead, contrary to the summary judgment standard, occasionally adopted interpretations that were the least favorable to Reedy." Appendix A at 36a.

Continuing from its principal thesis that every aspect of the case had to be viewed most favorably to Reedy, the Court of Appeals held that the District Court also erred by citing allegedly unsupported inculpatory facts; failed to include all omissions in the reconstructed affidavit; "erred in deciding that certain facts were inculpatory when they were either irrelevant or exculpatory" and by giving "little weight to the highly significant exculpatory facts" of some similarities between the Reedy attack and the subsequent Landmark and Evanson's responsibility for the investigation of both incidents. *Id.*

In addition to dissecting and rejecting the grounds for probable cause by reviewing them in the light most

favorable to Reedy rather than from the objective perspective of a reasonable investigating police officer, Appendix A at 36a-54a, the Court of Appeals neutralized its nod to that perspective in its truncated qualified immunity analysis by holding that, for the reasons described in its probable cause analysis, "viewing the evidence from Reedy's perspective, 'no reasonably competent officer would have concluded that a warrant should issue' when it did for her arrest for making a false report, for theft, and for receiving stolen property" *Id.* at 55a-56a.

In addition, the Court of Appeals imposed its unique view that qualified immunity was unavailable to Evanson, because "qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions," and no such situation existed in this case. Appendix A at 56a n. 37.

After ridiculing Evanson for "cluelessness," (*id.* at 51a), and a "closed mind," (*id.* at 52a n. 34), the Court of Appeals reversed the grant of summary judgment on Reedy's arrest claims. *Id* at 54a, 56a.

6. The Court of Appeals also reversed the grant of summary judgment on Reedy's blood test claims. Appendix A at 57a-71a.

The Court of Appeals constricted the broad consent forms that Reedy willingly signed without question or reservation before she provided the blood sample that was given to the police. Appendix A at 57a-64a. Even though the Court of Appeals recognized that Evanson

had probable cause to believe that the blood would reveal that Reedy used a controlled substance (*id.* at 57a n. 39), and even though the consent forms specifically allowed testing of the blood for the police (*id.* at 59a-61a), the Court of Appeals held that the consent forms were ineffective to allow Evanson to ask that the blood be tested for drugs. *Id.* at 62a-64a.

The Court of Appeals also held that the testing violated Reedy's expectation of privacy under *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Ferguson v. City of Charleston*, 308 F.3d 380 (4th Cir. 2002). Appendix A at 64a-71a. Those cases, however, did not involve fluid samples given to the police and consent forms broadly authorizing testing of those samples as may be related to the complainant's case.

REASONS FOR ALLOWANCE OF THE PETITION

The precedential opinion of the Court of Appeals in this case departs so far from the controlling precedents of this Court and so conflicts with other controlling decisions as to require the exercise of this Court's supervisory powers to maintain uniformity of decisions on federal law.

I. THE COURT OF APPEALS' DEPARTURE FROM ESTABLISHED LAW IN THE DETERMINATION OF PROBABLE CAUSE AND QUALIFIED IMMUNITY

How the facts are viewed in determining probable cause and qualified immunity for an arrest or for an arrest warrant affidavit is critical, as this case sharply demonstrates.

Viewed from the perspective of an objectively reasonable police officer, the core facts of this case established probable cause and qualified immunity, because those facts indicated, among other things, that Reedy had the motive and the opportunity to take her employer's money; that she apparently used the money; that there was no tangible evidence to support her sexual assault claim; that the power to the alarm system was disabled 20 minutes before the incident described by Reedy took place and when Reedy was the only person on site; and that Reedy may have made up the sexual assault claim to cover up her theft of the money.

Viewed from the "deliberately slanted" perspective most favorable to Reedy, as the Court of Appeals' opinion demonstrates, evidence providing probable cause to an objective and reasonable police officer disappears in a fog of presumptions and rationalizations.

The controlling decisions followed by the District Court but completely ignored by the Court of Appeals hold that the facts are to be assessed from the viewpoint of an objectively reasonable police officer, who can consider the inculpatory aspects of otherwise neutral, innocent, or explainable circumstances; who has no obligation to seek exculpatory evidence once probable cause is found; and who will be immune from liability even if mistaken, and even if other reasonable officers could disagree about the existence of probable cause.

Those decisions include:

- *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (existence of probable cause is determined by

viewing the facts "from the standpoint of an objectively reasonable police officer.");

- *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986) (objective reasonableness defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest: immunity will be lost only where the warrant application is so lacking in indicia of probable cause that no officer of reasonable competence would have requested the warrant);

- *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *Carswell v. Borough of Homestead*, 381 F.3d 235, 241-242 (3d Cir. 2004); *Paff v. Kaltenbach*, 204 F.3d 425, 436, 437 (3d Cir. 2000) (Qualified immunity applies to an officer who may have violated an individual's constitutional right if he reasonably but mistakenly believed that his conduct was lawful);

- *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425, 428 (3d Cir. Pa. 2000) (The question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.");

- *Franks v. Delaware*, 438 U.S. 154, 172 (1978); *Malley*, 475 U.S. at 341; *Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000); *Orsatti v. New Jersey State Police*, 71 F.3d 480, 484 (3d Cir. 1995) (If probable cause existed, or if reasonably competent police officers could disagree whether probable cause existed, the police are immune from liability.);

- *Hill v. California*, 401 U.S. 797, 804 (1971), *Baker v. McCollan*, 443 U.S. 137, 145 (1979), *Wright v. City of Philadelphia*, 409 F.3d 595, 601-602 (3d Cir. 2004), 409 F.3d at 601-602; *Wilson*, 212 F.3d at 789; *Johnson v. Campbell*, 332 F.3d 199, 211 (3d Cir. 2003) (Probable cause requires a belief of guilt that is reasonable, as opposed to certain, and does not depend on whether the suspect actually committed any crime.);

- *Baker*, 443 U.S. at 145, *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (The arrestee's innocence is irrelevant. Probable cause can include factors that might have an innocent explanation when viewed separately or from a perspective other than the police officer's. Conversely, a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.);

- *Baker*, 443 U.S. at 145-46, *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 790 n. 8 (3d Cir. 2000) (An officer is not required to undertake an exhaustive investigation in order to validate the probable cause that, in his mind, already existed. Additionally, once probable cause exists, an officer has no duty to investigate further or to look for exculpatory evidence.);

- *Franks*, 438 U.S. at 171; *Wilson*, 212 F.3d at 789 n. 5, *Orsatti*, 71 F.3d at 484, *Malley*, 475 U.S. at 341 (When a police officer acted in an objectively

> reasonable manner, allegations of negligence, mistake, or even malice on the part of the officer are insufficient.)

None of those cases indicates that the historical facts for the arrest or for the arrest warrant affidavit are to be viewed in a light most favorable to the arrestee to determine probable cause and qualified immunity.

Significantly, the Court of Appeals provided no supporting authority for its contrary views that, once the review and correction process established the affidavit's historical facts, the corrected affidavit "simply becomes one more set of factual assertions that must then be viewed in the light most favorable to the non-movant, in the same manner as all of the other evidence is to be considered at the summary judgment stage," and that "[t]he existence of a factual assertion in the corrected affidavit of course does not preclude other evidence pertaining to the same topic covered by that assertion from also being considered in the summary judgment process." Appendix A at 32a n. 24.

In addition, the Court of Appeals offered no acceptable justification for its unique view that qualified immunity was unavailable to Evanson, because "qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions," and no such situation existed in this case. *Id* at 56a n. 37.

Under the Court of Appeals' approach, no police officer can reasonably expect to obtain summary judgment on probable cause or on qualified immunity

absent an unconditional and incontestable confession by the suspect.

However, had the Court of Appeals not departed from established law and instead viewed the historical facts from the objective perspective of a reasonable police officer with Evanson's knowledge of those facts, the District Court's decision should have been affirmed.

Because the Court of Appeals accorded determinative significance to the Landmark incident and Cronin's testimony, the correct analysis begins with those aspects of the case.

The Court of Appeals noted that there were differences between the Reedy and the Landmark incidents, but it identified only one difference, the lack of physical evidence. Appendix A at 15a n. 14. Significantly, however, physical evidence established a positive and definite DNA link between the Landmark attack and others. No such link could be established in the Reedy case. Nevertheless, the Court of Appeals ridiculed Evanson for "cluelessness" (*id.* at 51a) and a "closed mind" (*id.* at 52a n. 34) in wanting a positive DNA link with the Reedy incident as well.

The Court of Appeals provided a prominent listing of similarities between the Landmark and the Reedy incidents (*id.* at 15a-16a), but it ignored the significant distinctions between those incidents provided in Cronin's deposition, which the Court of Appeals found "[p]articularly telling" in comparing the two incidents (*id.* at 52a).

The Court of Appeals also ignored the fact that, in late January of 2005, after laboratory tests indicated a match between the semen in the Landmark incident and the semen in another incident, Evanson contacted the Pennsylvania State Police and requested assistance in establishing an investigative task force to further examine similarities between those cases and others, and that Cronin headed that task force.

Cronin recognized several significant differences between the Reedy and the Landmark cases:

- the Landmark incident included physical corroborative evidence in the form of semen on the victim's shirt that eventually led to DNA matches with other incidents, but there was no such evidence in the Reedy incident (A. 506a, 627a);[3]

- Landmark involved a victim accompanied by a small child, but Reedy was alone (A. 617a-618a);

- Landmark involved a woman who was 11 years older than Reedy (A. 619a);

- there was a difference in the reported ages of the perpetrators (A. 621a);

- the perpetrators' footwear differed (A. 621a);

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3. The "A" pages refer to the Appendix that is part of the Court of Appeals' electronic file for this case at docket No. 09-2210.

- Landmark involved a taking of only $20 to $25, initially offered by the victim, but the Reedy incident involved more than $600 taken by the perpetrator from a cash register (A. 506a, 623a).

Additionally, the Landmark attack occurred in a dark, secluded parking lot outside of a building that was closed for business, but Reedy reported an attack which occurred inside a lighted store that was open for business and where anyone entering the store could easily have seen what was occurring. (A. 335a/663a, ¶ 146.)

The Court of Appeals noted that, after the State Police linked the Landmark attack to other attacks, "Evanson gave details about the Reedy attack during a teleconference conducted by the State Police task force [headed by Cronin] organized to catch that serial rapist," and Reedy advised the State Police through a tip line that she had been charged with making a false sexual assault report. Appendix A at 18a. However, the Court of Appeals completely ignored the powerfully revealing facts that Cronin obtained a complete copy of the Reedy police report from Evanson after Reedy's tip line call, had "concerns" when he read the Reedy police report, but yet never advised Evanson or anyone at Cranberry that the Reedy incident should be connected to the Landmark incident or to any other incident involved in Cronin's state-wide investigation, or otherwise overtly made any such connection between the Reedy incident and the Landmark incident or any other incident until after the perpetrator was captured and admitted to committing those crimes. (A. 149a, ¶s 17-18, 20-21, 219a, 590a, 626a, 629a; Appellant's Opening Brief, p. 11-12.)

In the overall context presented by the historical facts, an objective police investigator could have reasonably, even if mistakenly, treated the Landmark and the Reedy cases differently and found probable cause for Reedy's arrest.

As originally drafted, as revised in response to ADA Fullerton's advice to trim the original draft of the affidavit (which included virtually all of the information contained in the extensive police report), as revised by the District Court, and as further revised by the Court of Appeals, the affidavit's uncontested material facts, viewed objectively from the perspective of a reasonably competent police officer, as the law requires, show probable cause that Reedy may have been involved in the theft of her employer's cash which was used five days later as part of the down payment on a rental mobile home that she and her boyfriend had been asking about shortly before the theft, and that her claim of a sexual assault was false:

- money that Reedy had no right to was taken from premises that Reedy did not own or possess;

- the amount taken was $606.73;

- the theft occurred while Reedy was the sole employee in control of the premises, and there was no physical evidence of another's presence with her;

- Reedy's manager reported that the cash register tape showed that the "no sale" key had been pushed at the same time that Reedy had stated as the time of the occurrence;

- power to the alarm system was disabled about twenty minutes before the theft occurred;

- shortly after the incident, Reedy's manager was alerted by the alarm company that the power to the alarm system had been interrupted;

- the manager also learned that the alarm company had tried to telephone the store, but there was no answer;

- upon her return to the store, the manager discovered that the power cord to the alarm system had been unplugged from its socket behind a desk in the premises' back room;

- Reedy stated that the alleged perpetrator was not behind the desk where the plug to the alarm system was located;

- when confronted with the information about the unplugged alarm system, Reedy stated that she did not know how that happened and that she wanted to drop the whole thing and wanted it to go away;

- five days after the incident, Reedy's boyfriend made a cash deposit for the rental of a mobile home that he and Reedy had been looking at just a few days before the incident and had agreed to rent for a $365 security deposit and monthly rental, with Catholic Charities contributing $200 towards the security deposit.

The details added by the revised affidavits simply do not remove the probable cause inherent in the affidavit. For example, when Reedy promised to provide a written statement, the exact date when she provided that statement, whether or not Evanson had difficulty in contacting Reedy, and Reedy's providing a written statement are not essential facts, since Reedy was not charged with failure to cooperate or a like charge.

Despite the Court of Appeals' criticism, Reedy certainly appeared to Evanson that she was reluctant to give her written statement. Reedy did not respond to Evanson's phone call. Evanson had to make arrangements through her mother, and Reedy admitted that her mother threatened not to cash her paycheck unless she gave the statement. Even if Reedy's apparent reluctance had innocent roots, her apparent reluctance could be viewed by an objectively reasonable police officer in Evanson's position and with his knowledge to support probable cause.

That Evanson used the post-incident meeting at the police station to express his thoughts or hunches about the case to Reedy's parents or even to seek a confession was not unusual or improper police behavior. Changing the affidavit to include Evanson's, the parents', and Reedy's views on those points does not remove the probable cause inherent in the affidavit.

Similarly, adding each and every detail of Reedy's then alleged, but yet uncorroborated and unproven sexual assault; adding each and every word recorded about her repeated descriptions of the assault or about her being molested as a child; adding that she submitted

to a rape examination, which provided no evidence in support of her story, and that she received medical care for sexual assault; and adding that she complained to hospital personnel that the police were calling her a liar do not materially change the existence of probable cause.

Neither the rape examination nor the crime scene investigation revealed any physical evidence of the sexual assault. Additionally, suspects often consistently repeat a version of events, but that does not establish factual innocence, and suspects need not be believed when, as in this case, there was reason for disbelief; there was no physical evidence of the then alleged sexual assault; and additional facts known to the police reasonably supported a different scenario.

Moreover, the failure to connect the dots between the Landmark and the Reedy incidents in January of 2005 as Cronin later did in 20/20 hindsight only after the perpetrator confessed, amounts to no more than a possible negligence claim, not the lack of probable cause for Reedy's arrest.

The Court of Appeals' criticisms of the alarm system's role in establishing probable cause cannot be accepted. The Court of Appeals asserted that "Reedy never admitted that her attacker did not disable the alarm system," Appendix A at 44a, but the record shows that Reedy replied "no" when asked "if the suspect disabled any line for electricity or the alarm" (A. 352a).

Power to the alarm system was disrupted 20 minutes before the assault occurred, a point in time when Reedy was alone and before the time she stated that the

assailant entered the premises. The inference naturally flows that Reedy unplugged the power cord, and the unplugging of the power cord prior to the robbery was apparently intentional and highly suspicious under the circumstances.

As to the panic button, Reedy did tell officers that she did not press the panic button because she thought that it did not work. (R. 207a.) Knowing that (A. 271a), Evanson certainly could have reasonably believed that Reedy had not pressed the panic button because she thought that it did not work. However, why Reedy may not have pressed the panic button was simply immaterial, because her not pressing that button played no role in the affidavit that Evanson presented to the magistrate.

The Court of Appeals' view that inculpatory factors were not inculpatory information or could be explained fails to appreciate that innocent or explainable factors can still be included in the probable cause matrix. Viewed from the objective perspective of a reasonable police officer, as the law requires, the facts presented in the submitted and the revised affidavits established probable cause.

The Court of Appeals should have followed established law and affirmed the summary judgment that the District Court granted to Evanson. This Court should grant review, vacate the Court of Appeals' decision, and reverse the Court of Appeals' judgment.

II. THE COURT OF APPEALS' DEPARTURE FROM ESTABLISHED LAW ON THE BLOOD TEST CLAIM

On Reedy's blood test claim, the Court of Appeals' decision is contrary to the decisions in: *Schmerber v. California* 384 U.S. 757 (1966), and *Hedges v. Musco*, 204 F.3d 109, 120 (3d Cir. 2000) (upholding warrantless collection and testing of blood samples where the tests are reasonable and conducted within a reasonable amount of time).

The collection and use of blood samples by the police without a warrant has been upheld for decades. *Schmerber*, *supra*; *Hedges*, *supra*. The tests must be reasonable and conducted within a reasonable amount of time. Here, there is no question that those elements were satisfied. The tests were simple screens; they did not involve additional bodily invasion; and, they were conducted shortly after the incident on a blood sample that Reedy consensually acknowledged would be provided to the police.

Moreover, the consent forms that Reedy voluntarily signed were broad enough to permit Evanson to ask for additional testing of the blood sample that was given to the police.

The Court of Appeals' reliance on the *Ferguson* cases is misplaced. Those cases did not involve fluid samples given to the police and consent forms broadly authorizing testing of those samples as may be related to the complainant's case. The Court of Appeals should have affirmed the summary judgment in favor of

Evanson on Reedy's blood test claim. This Court should grant review and reverse the Court of Appeals' decision.

CONCLUSION

This Court should grant the writ, vacate the Court of Appeals' decision, and reverse the Court of Appeals' judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — AUGUST 2, 2010 OPINION OF THE COURT OF APPEALS

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2210

SARA R. REEDY,

Appellant

v.

FRANK S. EVANSON, individually and in his official capacity as a Police Officer of the Township of Cranberry; STEVE MANNELL, individually and his official capacity as the Public Safety Director of the Township of Cranberry; KEVIN MEYER, individually and in his official capacity as a Police Officer of the Township of Cranberry

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On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 06-cv-01080)
District Judge: Honorable David Stewart Cercone

Argued March 11, 2010

Appendix A

Before: BARRY, JORDAN and VAN ANTWERPEN,
Circuit Judges.

(Filed: August 02, 2010)

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Appendix A

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

While working as a cashier at a convenience store, nineteen-year-old Sara R. Reedy was sexually assaulted and robbed at gunpoint by a serial sex offender. She reported the crime to the police within minutes, subjected herself to a rape kit examination, and gave detailed and consistent statements to law enforcement officers and hospital staff. However, Detective Frank Evanson of the Cranberry Township, Pennsylvania Police Department, the lead investigator assigned to Reedy's case, believed that Reedy had fabricated the incident to cover up her own theft of cash from the convenience store. Approximately three months later, Evanson also became the lead investigator on another sexual attack that was substantially similar to the assault on Reedy and that Evanson knew was suspected to be the work of a serial rapist. Six months after the assault on Reedy, Evanson filed a criminal complaint against her, charging her with falsely reporting a crime, theft, and receipt of stolen property. Reedy spent five days in jail. The charges against her were dropped only when the serial rapist was captured and confessed to assaulting her, to committing the theft, and to committing the other sexual assault investigated by Evanson. Reedy later commenced this suit in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. § 1983 against Evanson and another Cranberry Township Police Officer, Kevin

Meyer, and the Township's Public Safety Director, Steve Mannell. She asserted claims of unlawful seizure and unlawful search under the Fourth Amendment, and accompanying state law claims of false arrest, false imprisonment, abuse of process, and intentional infliction of emotional distress. The District Court granted summary judgment to the defendants on all of Reedy's claims, and this appeal followed. For the reasons described below, we will vacate in part, reverse in part, and affirm in part, and will remand the case for further proceedings.

I. Background

A. *The Assault*

Because it is necessary to demonstrate the similarities between the assault on Reedy and the other sexual assault that Evanson was investigating, a graphic description of events is, unfortunately, required.

On July 14, 2004, Reedy was working alone as a cashier at the JG Gulf Station (the "store" or "Gulf Station") in Cranberry Township, located in Butler County, Pennsylvania. At approximately 10:40 p.m., a man later identified as Wilbur Brown entered the Gulf Station. He walked toward the counter where Reedy was standing, lifted his shirt, pulled out a gun, and ordered Reedy to sit on the floor behind the counter while he opened the store's cash register by pushing the "no sale" key. Although the store was equipped with a panic alarm button, Reedy did not press it. After

Brown removed the money from the register, he ordered Reedy to take off her shirt, which she did. He faced her, stared out the store's window, unzipped his pants, and exposed himself. He then began to sexually assault Reedy, fondling her breasts and forcing her to perform oral sex on him. While she was doing so, he yelled, "Suck my dick and don't bite it or I'll shoot you." (App. at 350.) He also told Reedy to insert her finger into his anus, which she did. Brown then ejaculated in Reedy's mouth and threatened to harm her if she did not swallow all of his semen.

After the assault, Brown ordered Reedy to go to the back of the store, where there was an office that held the Gulf Station's safe. When Brown noticed that the store's safe was partially open, he asked Reedy if there was any money inside, to which she responded that there was. Brown or Reedy[1] then removed two envelopes of money from the safe. Brown next ordered Reedy to disable the telephone, which she did by pulling the lines from the wall. Finally, he ordered Reedy to remain in the back office for a few minutes while he left. He then fled through the front door of the store. After waiting for a short while, Reedy exited through the back door of the store and ran to a neighboring service station for help. One of the employees there called the police to report the robbery and sexual assault.

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1. It is unclear from the record whether Reedy removed the money from the safe on Brown's command, or whether Brown removed the money himself.

Appendix A

B. *The Initial Investigation*

Officers from the Cranberry Township Police Force arrived at the scene within minutes, and Reedy's boyfriend, Mark Watt, whom she had called, arrived shortly thereafter. Reedy provided one of the police officers, Charles Mascellino, a detailed description of the assault. She also described her assailant as a white male, approximately 5'6" to 5'7", wearing a blue baseball cap, blue jeans, and blue boxer shorts, and appearing in his mid-30s to early 40s.[2] Reedy was unsure of which direction her assailant went when he left the store, and she could not provide a description of any vehicle he might have used. Reedy was "crying, shaking, talking real loud," and "hysterical" during the interview. (App. at 252 p. 20.) One of the officers offered Reedy the services of a sexual assault counselor but she refused, stating that she had been sexually abused as a child and knew how to handle the situation. The officers searched

2. Reedy's description of her assailant's age is in dispute. The police report indicates that Reedy described her assailant as appearing between 28 and 31 years of age. Similarly, the affidavit of probable cause that Evanson filed against Reedy months later when he charged her with criminal activity (the "Affidavit") also states that Reedy described her assailant as appearing between 28 and 31 years of age. Reedy, however, maintains that she advised the police officers that her assailant was in his mid-30s to early 40s. Moreover, the record shows that in her later statement to a nurse that same night, Reedy described her assailant as appearing to be in his mid-30s to 40s. Drawing all inferences in Reedy's favor, the District Court considered Reedy to have described the assailant as in his mid-30s to early 40s.

the wooded area behind the Gulf Station but could not locate Reedy's assailant. An alert for the suspect was broadcast around the local area. Four fingerprint specimens were taken at the Gulf Station but none of them yielded any useful forensic findings.

C. *The Hospital*

Mascellino took Reedy and Watt to the University of Pittsburgh Medical Center in Cranberry Township, where Reedy underwent a rape kit examination and where she first met Detective Evanson. Evanson was the lead detective assigned to investigate the incident. He had been a police detective for Cranberry Township since 1986 and, by the time of these events, had investigated more than ten rapes in his career. On the night of the incident, Evanson traveled to the hospital, where he introduced himself to Reedy and asked her what happened. She provided an account of the assault that matched in detail what she had told Mascellino. Reedy later said that, after hearing her description of the attack, Evanson asked her how many times she did "dope" each day. (App. at 396.) He then called her a liar and repeatedly accused her of stealing the money from the store. He asked Reedy where she had put the stolen money, to which she responded that she did not know where the money was. When Reedy began to cry under this hostile questioning, Evanson told her not to bother, "because [your] tears aren't going to save [you] now."[3] (App. at 398.)

3. In his deposition, Evanson denied asking Reedy about the location of the money, and said he did not recall making the statement about her tears.

After speaking with Evanson, Reedy provided another full and consistent description of the assault to Mary Beth Farah,[4] the nurse who was treating her and who administered the rape kit. According to Farah's notes from the conversation, Reedy told her that none of the assailant's semen had gotten onto her face and that, during the few minutes she was forced to wait in the back room while her assailant escaped, she gargled with water twice and washed her hands with soap. She also told Farah that Evanson had called her a liar. In sum, by the time the night of the assault was over, Reedy had provided separate, detailed, and consistent accounts of the incident to Mascellino, Farah, and Evanson, and had been accused by Evanson of being a liar and a thief.

During their confrontational conversation at the hospital, Evanson took note of Reedy's physical appearance. He said that her eyes looked dilated and that her speech was slow. According to Evanson, he asked Reedy if she had "consumed prescribed or unprescribed narcotics," to which she responded she had not. (App. at 351.) Shortly thereafter, Evanson learned that Reedy's urine samples had tested positive for marijuana. He asked Reedy if she had used marijuana recently, and she answered that she had smoked it five or six days ago but had not consumed any other medication. According to Evanson, "[t]hat

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4. The record and the briefs contain references to both a Mary Beth Farrah and Mary Beth Farah. We have adopted the latter spelling, as used by the District Court.

information led [him] to question [Reedy's] credibility and to ask the hospital to test for drug usage ... blood samples that had been taken [from Reedy] ... as part of the 'rape kit' ... ." (Appellees' Answering Br. at 7.) Thus, without speaking to Reedy, Evanson directed the hospital to perform additional toxicology testing on Reedy's blood samples.

Eight days later, on July 23, 2004, Evanson obtained and executed a search warrant for Reedy's medical records. The records included the results of the additional toxicology screening that Evanson had ordered, which revealed that Reedy had ingested diazepam, better known as Valium, and confirmed that Reedy had used marijuana. When Evanson later asked Reedy about the diazepam, during a visit he made to her home a couple of weeks later,[5] Reedy explained that Watt, who had a legal prescription for the drug, brought her a pill on the night of the assault to "assist her in calming down." (*Id.* at 356.)

D. *Information From The Gulf Station's Manager*

In the days following the incident, Evanson spoke with Carol Hazlett, Reedy's supervisor at the Gulf Station. [6] Hazlett told Evanson that, on the day of the attack, she left the Gulf Station at 3:00 p.m., when

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5. *See infra*, Section I.F.

6. It is not clear exactly when Evanson met with Hazlett. However, it appears from the police report that it happened at some point between July 15 and 18, 2004.

Reedy's shift began.[7] At approximately 11:20 p.m. that night, she returned to the Gulf Station because she had received a phone call at her home from Security Systems of America ("SSA"), the Gulf Station's security monitoring company, informing her that there had been an interruption in the power source for the store's alarm system.[8] SSA called Hazlett at home after receiving no answer when it attempted to call the Gulf Station. A report from SSA reveals that Hazlett was notified at approximately 11:15 p.m. about a power failure that had occurred at approximately 10:15 p.m.

The day after the incident, Hazlett went back to the Gulf Station. When she was in the back room trying to fix the phone lines that had been torn from the wall, she noticed that the alarm system's power cord, which was located behind a desk, had been unplugged. She also learned, by looking at the Gulf Station's cash register tape, that the register had been opened by pressing the "no sale" key at the exact time that Reedy had noted. Finally, Hazlett discovered that $606.73 in cash was missing from the store.

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7. Evanson wrote in the Affidavit that Hazlett left the store at 9:15 that evening (rather than 3:00 p.m.) but Hazlett stated in her deposition that she left the store at 3:00 p.m. The District Court proceeded on the premise that Hazlett's departure time was 3:00 p.m.

8. Evidently, the power source for this alarm system was different than the power source for the store's panic alarm. Police officers tested the panic alarm on the night of the incident, before the power to the store's SSA alarm system had been restored, and discovered that the panic alarm was working. (App. at 333, ¶ 128; 662, ¶ 128.)

Appendix A

E. *Meeting at the Police Station*

On the morning of July 15, 2004, while Reedy was still in the hospital, Evanson requested that she come to the police station to provide a written statement to the police. The next day, July 16, 2004, she traveled to the Cranberry Township Police Station with her mother and stepfather, where she provided a detailed, written statement about the incident.[9] Her description again matched what she had previously told Mascellino, Farah, and Evanson. She also included the assertion that Evanson had accused her of lying.

While Reedy was writing her statement, Evanson spoke with Reedy's mother and stepfather, Debbie and Paul Bosco, Jr. He suggested that Reedy and Watt were responsible for the theft at the Gulf Station and that he would soon be able to prove it. He told the Boscos that, on the night of the attack, Watt had not gotten out of his car right away when he arrived at the scene, which

9. In the Affidavit, Evanson stated that Reedy did not come to the police station until July 23, 2004. He also wrote that he had attempted to contact Reedy for several days (from July 15-23) but was unsuccessful. Reedy's mother, however, testified that she called Evanson on July 15, the day after the incident, and arranged for her and Reedy to travel to the police station the very next day. Reedy, her mother, and her stepfather, all testified that they went to the station and met with Evanson on July 16, 2004, the first day that Reedy was out of the hospital. Drawing all inferences in favor of Reedy, the District Court proceeded on the premise that Evanson spoke with Reedy's mother on July 15, 2004, and that Reedy and her family met with Evanson the next day, on July 16, 2004.

Evanson thought was suspicious. Evanson also told them he found it suspicious that Reedy had reported that the crime happened around 10:40 p.m. and that the cash register had been opened at exactly that time. In his view, "nobody that's in this kind of a hysteria would know exactly what time it was, so she had to have preplanned this because nobody would know this." (App. at 448-49.) Finally, he told Reedy's parents that "the sooner [Reedy] confessed ... he could wrap it up." (*Id.* at 449.) He warned the Boscos that it was only "a matter of time ... before he tied up the loose ends and put it all together so it would be in [Reedy's] best interest if [they] would encourage her to ... admit it." (*Id.* at 22 (first and third alterations in original).) He also told Paul Bosco that he wanted to "burn" Watt.[10] (*Id.*)

Evanson then spoke directly with Reedy. He asked her about the alarm being unplugged. Specifically, he asked whether she had been ordered to disable any wires besides the phone lines on the night of the incident, and, if so, where those wires were located. Reedy responded that she did not believe that the

10. In his deposition, Evanson conceded that some of this conversation occurred. Specifically, he stated that while Reedy was writing out her statement, he expressed to Reedy's mother that Reedy's story was suspect because it contained what he viewed as critical gaps in information. He also conceded that he spoke with Reedy about the security alarm system and about his suspicion surrounding the fact that she was able to report the exact time that the cash register was opened. However, Evanson denied discussing Watt's behavior and denied telling the Boscos that it would be better for Reedy if she confessed.

assailant had disabled anything other than the phone line and, thus, did not know how the alarm system had been disabled.

According to Evanson, when he asked Reedy how the power failure on the alarm could have occurred, she grew "verbally abusive" and stated "I just want to drop the whole thing" and "I just want this whole thing to go away." (*Id.* at 197-98 ¶¶ 47-48.) According to Reedy, on the other hand, Evanson was hostile toward her during the meeting and repeatedly accused her of lying and of taking money from the store. Therefore, according to Reedy, any hostility or desire on her part to end the proceedings was due to "Evanson's hostility, baseless accusations and badgering." (*Id.* at 321 ¶¶ 47-48.) Reedy's stepfather also stated that Reedy was not "verbally abusive" during the interview but was simply "upset" at being falsely accused less than two days after being sexually assaulted.[11] (*Id.* at 451-52.)

F. *Meeting at the Trailer Park*

On August 17, 2004, Evanson and Detective Kevin Meyer, another detective from the Cranberry Township Police Force, went to the trailer park where Watt and

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11. Evanson also asked Reedy if she would be willing to take a polygraph test, and she agreed to do so. The test results were ultimately inconclusive and do not appear to have played any role in the investigation or subsequent legal proceedings.

Reedy were living.[12] According to Reedy, the officers asked her to step outside her trailer. She did so and they had her sign a waiver of her *Miranda* rights. They then began to press her to change her earlier written statement about the assault. Evanson presented Reedy with the hospital toxicology report and demanded to know why her blood contained illegal substances. In her deposition, Reedy described the encounter with Evanson, saying, "I asked him to leave several times, just leave, leave me alone. [I said] I'm not changing my statement. And he refused. ... He had me completely hysterical, and, ... [i]t was totally embarrassing, insulting."[13] (*Id.* at 407-08.) This meeting appears to be the last investigative effort regarding Reedy that Evanson took before he charged her nearly five months later with making false reports to the police, theft, and receiving stolen property.

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12. Sometime during the second half of July 2004, Meyer learned from David Kriley, manager of the Green Acres Trailer Park, that, on July 19, 2004, five days after the assault at the Gulf Station, Reedy and Watt applied to rent a mobile home and agreed to a monthly rent of $ 365.00, with a security deposit of one month's rent prior to moving in. On their rental application, Reedy and Watt indicated that Catholic Charities would provide $ 200.00 toward the initial security deposit. On July 20, 2004, Watt provided Kriley with $165.00 in cash to fulfill the remainder of the security deposit. These sums later figure into the District Court's consideration of whether Reedy had stolen cash from the store.

13. In his answer to Reedy's amended complaint, Evanson acknowledged that he and Meyer visited Reedy and Watt on August 17, 2004, but admitted only to offering to "drop" criminal charges against Reedy if she passed a polygraph test. (App. at 120, ¶25.)

Appendix A

G. *The Landmark Attack on October 13, 2004*

On October 13, 2004, approximately three months after the attack on Reedy, another woman was sexually assaulted and robbed at gunpoint in Cranberry Township. That attack, which occurred while the woman was leaving the Landmark Building, was the only other reported sexual assault in Cranberry Township in 2004 and was also assigned to Evanson as the lead investigator. The Landmark attack bore several similarities to the attack on Reedy:[14]

- Both occurred in Cranberry Township, separated by 3 months.
- Both occurred at businesses located on Route 19, approximately 1.5 miles apart from one another.
- Both attacks occurred at the same time of evening — approximately at 10:40 p.m.
- In both attacks, the assailant made no effort to conceal his identity.
- In both attacks, the female victim was assaulted while at work or while leaving work.

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14. There were also differences between the two incidents. Notably, the Landmark incident left physical, corroborative evidence in the form of semen on the victim's shirt that led to DNA matches with other sexual assaults. However, there was no physical evidence from the Reedy attack that could have led to a DNA match.

- Both victims described their assailant as a Caucasian male with brown (Reedy) or light brown hair (Landmark), wearing blue jeans.

- Both victims described their assailant as being around the same age. The Landmark victim described her assailant as in his late-30s while Reedy described her assailant as in his mid-30s to early 40s.

- In both attacks, the assailant used a black handgun.

- Both victims were robbed, in addition to being sexually assaulted.

- Both victims were ordered to bare their breasts and had their breasts fondled by the assailant.

- Both victims were forced to perform oral sex upon the assailant.

H. *The Affidavit*

In January 2005, six months after Reedy had reported the assault, and three months after the Landmark attack, Evanson began drafting the Affidavit he would submit with the criminal complaint against Reedy. Evanson sent an initial version of the Affidavit to William Fullerton, an Assistant District Attorney for Butler County, Pennsylvania. Fullerton reviewed the draft and advised Evanson that it was inadequate.

Specifically, on January 11, 2005, Fullerton sent the following email to Evanson:

> I got your PC [probable cause Affidavit] and [police] report. I did not know they would be virtually identical. ... I dont [sic] have the time to edit and re-write the whole thing. If you want to re-draft the PC and include a description of the evidence that makes out the elements, I would be glad to review that. My thinking is that the PC needs to set forth that a report of a crime was made and what information you have, in brief, [that] shows that the event reported did not occur.

(App. at 725.) Fullerton confirmed in his deposition that he sent an email to Evanson encouraging Evanson to "explain the elements, [and] why [he] th[ought] the crime [was] there." (*Id.* at 703.) Although Fullerton expected to see another draft of the Affidavit, Evanson never sent a revised draft to him.

On January 14, 2005, Evanson learned from the Pennsylvania State Police that DNA analysis linked the Landmark attack to other sexual assaults in Pennsylvania. That same day, Evanson sent a copy of his police report about the Landmark attack to another town's police department via fax, with the subject line "Serial Rapist." (App. at 609.) Also on that same day — six months after Reedy was attacked, five months after Evanson's investigative efforts had ceased, and three months after the Landmark attack — Evanson filed the

criminal complaint and Affidavit against Reedy with a Pennsylvania Magisterial District Judge. Assistant District Attorney Fullerton did not see the final Affidavit until after Evanson had filed it, and the only changes Evanson had made to the Affidavit from the draft that was earlier sent to Fullerton involved removing portions from the prior draft.

Later that month or early in February, Evanson gave details about the Reedy attack during a teleconference conducted by a State Police task force organized to catch the serial rapist.[15] Evanson also sent a copy of the police reports on the Reedy incident and on the later Landmark incident to Corporal George Cronin, the State Police officer in charge of the serial rapist task force.

I. *Reedy's Arrest and Subsequent Developments*

Reedy was notified of the warrant for her arrest and, on January 19, 2005, turned herself in. She was unable to post bond and was taken into custody and transported to the Butler County jail, where she spent five days awaiting a bail reduction hearing. Later, in February, Reedy called a State Police tip line that had been set up to obtain information about the serial rapist. She explained that she had been sexually assaulted but had been criminally charged for reporting the assault.

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15. It is not clear exactly when in January or early February the teleconference occurred. It was, however, apparently after January 14, 2005 because Evanson stated in his deposition that charges had already been filed against Reedy at that point.

On May 9, 2005, while charges were still pending against Reedy, Evanson was advised by the State Police that Reedy had contacted the task force tip line about the assault at the Gulf Station.

Reedy's criminal trial was scheduled to begin on September 19, 2005. On August 22, 2005, Wilbur Brown was apprehended while he was assaulting a female convenience store clerk in Brookville, Pennsylvania. Brown subsequently confessed to both the attack on Reedy and the Landmark attack. On September 1, 2005, the Butler County District Attorney dropped all charges against Reedy.

J. *Procedural History*

On August 14, 2006, Reedy filed the present suit against Evanson, Meyer, Steve Mannell (the Public Safety Director for Cranberry Township), Butler County, Assistant District Attorney Fullerton, and Timothy F. McCune, the Butler County District Attorney. On March 12, 2008, after Butler County, Fullerton, and McCune were dismissed from the suit, Reedy filed an amended complaint[16] against Evanson, Meyer, and Mannell, containing the following counts:

> Count 1: Unlawful search in violation of the Fourth Amendment, based on the toxicology screening performed on Reedy's blood;

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16. For simplicity, we refer to the amended complaint as the "complaint."

Appendix A

Counts 2, 3, and 4: Unlawful seizure, false imprisonment, and malicious prosecution in violation of the Fourth Amendment, based on Reedy's arrest;

Count 5: Harm to liberty interest in violation of the Due Process Clause of the Fourteenth Amendment;[17]

Counts 6 and 7: State law claims of false arrest, false imprisonment, and abuse of process;

Count 8: A state law claim of intentional infliction of emotional distress[18]

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17. Neither the District Court nor the parties have discussed Reedy's Fourteenth Amendment claim (Count 5). Either Count 5 has been abandoned, or, despite the fact that Count 5 is against one additional party as compared to Counts 2-4, they have treated Count 5 as being subsumed into Reedy's *Fourth Amendment* unlawful seizure claims. *Cf. Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (holding that a Fourth Amendment claim of excessive force is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard"). Given the handling of Count 5 by the parties and the District Court, we too decline to address that Count as an independent claim.

18. Counts 1-4 were brought against Evanson and Mannell; Count 5 was brought against Evanson, Mannell, and Meyer; Counts 6 and 7 were brought against Evanson only; and Count 8 was brought against Evanson and Meyer.

Appendix A

On July 1, 2008, all of the defendants filed a motion for summary judgment. On March 31, 2009, the District Court granted the motion for summary judgment and entered final judgment in favor of the defendants and against Reedy on all counts.[19] However, the Court first held that, when the evidence was viewed in the light most favorable to Reedy, there was sufficient evidence to establish that Evanson knowingly or recklessly included false statements in, and omitted relevant information from, the Affidavit he had filed in support of Reedy's arrest.[20] The Court thus had to "excise the offending inaccuracies and insert the facts recklessly omitted [to] determine whether or not the corrected ... affidavit would establish probable cause." (App. at 27 (quotations omitted).) After "[p]erforming such surgery," the Court held that the Affidavit as corrected, "provides probable cause to believe ... [that Reedy] committed the crimes ... ." (*Id.* at 27, 34.) The Court further held that, even if a genuine issue of fact existed as to whether the corrected Affidavit establishes probable cause, Evanson was entitled to qualified immunity because "a jury could not conclude that no reasonabl[y] competent officer would fin[d] probable cause in this instance." (*Id.* at 39-40.) The Court therefore granted Evanson summary judgment on Reedy's unlawful seizure claims.

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19. The District Court's opinion was not filed until April 20, 2009.

20. These omissions and false statements are discussed more thoroughly below. *See infra*, Section III.A.ii.

Next, the District Court rejected Reedy's claim that her blood had been unlawfully searched, holding that, by signing two consent forms in connection with the rape examination at the hospital, she had consented to the testing of her blood for drugs. Alternatively, the Court determined that Reedy had "lost any reasonable expectation of privacy in that blood" once it was removed from her body. (*Id.* at 42.) The Court next held that Reedy had failed to produce sufficient evidence that Meyer and Mannell actively participated in any violation of her constitutional rights and that those defendants were accordingly entitled to summary judgment on all claims. Finally, the Court granted summary judgment to Evanson on Reedy's emotional distress claim, concluding that Evanson's conduct was not sufficiently "extreme and outrageous" to be a foundation for such a claim. (*Id.* at 43.) Having lost on all her claims, Reedy filed a timely notice of appeal.

II. Standard of Review[21]

A district court's grant of summary judgment is subject to plenary review. *Horn v. Thoratec Corp.*, 376 F.3d 163, 165 (3d Cir. 2004). Summary judgment is only proper when there is no genuine issue of material fact in the case and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c)(2). Our role

21. The District Court had jurisdiction over Reedy's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. The District Court had supplemental jurisdiction over Reedy's state law claims pursuant to 28 U.S.C. § 1367. We have jurisdiction over this appeal under 28 U.S.C. § 1291.

in reviewing a grant of summary judgment is "not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009). If so, summary judgment cannot stand. We must view all of the facts in the light most favorable to the non-moving party, who is "entitled to every reasonable inference that can be drawn from the record." *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000). "[W]hen there is a disagreement about the facts or the proper inferences to be drawn from them, a trial is required to resolve the conflicting versions of the parties." *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982).

III. Discussion

Reedy raises several contentions on appeal. First, she argues that the District Court improperly granted summary judgment as to her unlawful seizure claim because, whether Evanson's Affidavit is analyzed on its face or after being corrected for omissions and false statements, there was no probable cause to arrest her. Reedy further argues that the District Court erred in holding that Evanson was entitled to qualified immunity. She says that immunity is not warranted because, viewing all the facts in the light most favorable to her, a reasonably competent officer would realize that there was no probable cause to arrest her. Second, Reedy argues that the District Court erred in holding that the

toxicology screening of her blood for drug usage was within the scope of the two consent forms she signed as part of her rape kit examination. The District Court further erred, she says, when it held that she had no reasonable expectation of privacy regarding the testing of her blood simply because the blood had already left her body. Reedy further contends that the Court erred in dismissing her claims against Meyer and Mannell because the record contains sufficient evidence to support a claim that they violated her constitutional rights, namely, that they were active participants in arresting her without probable cause. Finally, she says the Court erred in granting summary judgment to Evanson on her emotional distress claim because his conduct qualifies as extreme and outrageous. We address each of these contentions in turn.

A. *Unlawful Seizure: Probable Cause and Qualified Immunity*[22]

The Fourth Amendment provides that people are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ... and no Warrants shall issue, but upon probable cause ... ." U.S. CONST. amend. IV. It is well-established that

22. Our analysis of "unlawful seizure" (Count 2) encompasses Reedy's claims of false imprisonment and malicious prosecution (Counts 3 and 4), as well as her related state law claims of false arrest, false imprisonment, and abuse of process (Counts 6 and 7), because all of those claims turn on whether probable cause existed for the arrest.

the Fourth Amendment "prohibits a police officer from arresting a citizen except upon probable cause." *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, 92 S. Ct. 839, 31 L. Ed. 2d 110(1972)).

Probable cause "requires more than mere suspicion[.]" *Orsatti*, 71 F.3d at 482. However, it does not "require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). Rather, "probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Orsatti*, 71 F.3d at 483; *see also Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000) ("Probable cause exists if there is a 'fair probability' that the person committed the crime at issue." (citation omitted).). "Probable cause need only exist as to [one of the] offense[s] that could be charged under the circumstances." *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994). In analyzing whether probable cause existed for an arrest, we must take a "totality-of-the-circumstances approach." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

i. *The Original Affidavit*

Taken on its face, Evanson's original Affidavit accused Reedy of false reporting, theft, and receiving

stolen property[23] based on the following assertions of fact, some of which have been contradicted by Reedy and some of which were later corrected by the District Court:

(1) On July 14, 2004, Reedy reported to Robert McGee, an employee at the service station next door to the Gulf Station, that she had been sexually assaulted and robbed by an unknown assailant.

(2) Reedy provided McGee with a description of her assailant, but was unsure of the direction he went when he left the store and could not provide a description of any vehicle he may have used.

(3) Reedy provided Mascellino and Evanson with a description of the robbery, which she said occurred at 10:40 pm.

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23. 23 The Pennsylvania Crimes Code (the "Code") states that a person commits the crime of false reporting if he "reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur[.]" 18 PA. CONS. STAT. § 4906(b)(1). With respect to theft, the Code states that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, moveable property of another with intent to deprive him thereof." *Id.* § 3921(a). A person commits the crime of receiving stolen property "if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner." *Id.* § 3925(a).

(4) Evanson attempted to contact Reedy on July 15, 2004, and was unable to reach her for several days.

(5) Evanson spoke with Hazlett and learned that the power for the store's alarm system was interrupted on the night of the robbery and alleged assault and that the company monitoring the security system had unsuccessfully attempted to contact the store.

(6) Hazlett returned to the store after the incident and found that the power cord for the alarm system had been unplugged.

(7) Reedy's statement regarding the assailant pressing the "no sale" key on the cash register matched the exact time indicated on the register tape.

(8) $606.73 was taken from the store's cash register during the robbery.

(9) On July 23, 2004, Evanson met with Reedy and her mother. He asked Reedy if her assailant had disabled, or had ordered her to disable, any wires other than the telephone lines during the attack. Reedy responded that he had not. Evanson also specifically asked Reedy if her assailant disabled any lines for the

electricity or the alarm, to which Reedy responded no.

(10) When Evanson told Reedy that the security system company had reported that the security system's power failed at 10:14 p.m., Reedy stated that she did not know how that occurred.

(11) When Evanson told Reedy that a power cord for the security system was unplugged in the back room, and questioned Reedy about how that could have happened, Reedy became verbally abusive and stated, "I just want to drop the whole thing."

(12) When Evanson told Reedy that the matter could not be dropped, Reedy said, "I just want this whole thing to go away."

(13) Meyer learned that in mid-July, Watt and Reedy looked into renting a mobile home with a monthly rental fee of $365.00 and a security deposit of that same amount.

(14) On July 19, 2004, Watt and Reedy in fact applied to rent a mobile home. Catholic Charities indicated that it would pay $200.00 of the security deposit and that Watt and Reedy would pay the remaining $ 165.00. On July 20, 2004, Watt paid the

> remaining $ 165.00 of the security deposit in cash.

ii. *The Corrected Affidavit*

Reedy argued before the District Court that the Affidavit not only lacked probable cause on its face, but that it contained material falsehoods and omissions. An arrest warrant "does not, in itself, shelter an officer from liability for false arrest." *Wilson*, 212 F.3d at 786. Instead,

> a plaintiff may succeed in a § 1983 action for false arrest made pursuant to a warrant if the plaintiff shows, by a preponderance of the evidence: (1) that the police officer knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause.

Id. at 786-87 (internal quotations omitted). Thus, a court faced with a claim that an arrest warrant contains false assertions and omissions must first determine whether the officer made those false assertions or omissions either deliberately or with reckless disregard for their truth.

Whether something is done deliberately is a straightforward question of fact. To know whether something is done with "reckless disregard" for the

truth requires some explanation of the meaning of that term. Assertions are made with reckless disregard when, "viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Id.* at 788 (internal quotations omitted). Assertions can be made with reckless disregard for the truth "even if they involve minor details — recklessness is measured not by the relevance of the information, but the demonstration of willingness to affirmatively distort truth." *Id.* "[O]missions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know" in making a probable cause determination. *Id.* at 783.

After establishing that "there [is] sufficient evidence of omissions and assertions made knowingly, or with reckless disregard for the truth," a court "assess[es] whether the statements and omissions made with reckless disregard of the truth were material, or necessary, to the finding of probable cause." *Id.* at 789 (internal quotations omitted). "To determine the materiality of the misstatements and omissions," a court must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether ... the 'corrected' ... affidavit would establish probable cause." *Id.*

This two-part exercise — determining the affiant's motivation and constructing a revised Affidavit without material omissions or misstatements — ensures that a

police officer does not "make unilateral decisions about the materiality of information, or, after satisfying him or herself that probable cause exists, merely inform the magistrate or judge of inculpatory evidence." *Id.* at 787. We have cautioned that "[a]n officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Id.* at 790 (internal quotations omitted).

The District Court agreed with Reedy that, viewing the evidence in the light most favorable to her, a jury could conclude that the Affidavit suffered from recklessly-made false statements and omissions.[24]

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24. Evanson does not directly challenge the District Court's findings of false statements and omissions in the Affidavit. Rather, he argues that the Affidavit he originally submitted, as well as the revised Affidavit, both "present probable cause." (Appellees' Answering Br. at 29-30.) We note, however, that the District Court wrongly applied the summary judgment lens of "all inferences in favor of the non-moving party" to the analytical steps we outlined in *Wilson*. We did not say in *Wilson* that the question of whether an affidavit has material omissions and misstatements should be viewed from the deliberately slanted perspective that summary judgment demands. On the contrary, the necessary import of *Wilson* is that the effort to determine whether an affidavit is false or misleading must be undertaken with scrupulous neutrality. *See Wilson*, 212 F.3d at 787 (citing criminal cases *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), in support of the proposition that a court testing probable cause for an arrest challenged in a § 1983 case "must first consider whether [the plaintiff] adduced sufficient evidence

(Cont'd)

Specifically, the District Court reached the following conclusions:

(1) Evanson omitted, with reckless disregard for the truth, that he spoke with Reedy's mother on July 15, 2004, the day after the

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(Cont'd)

that a reasonable jury could conclude that [defendant police officer] made statements or omissions that he 'knew [were] false, or would have known [were] false except for his reckless disregard for the truth.'").

Specifically, *Wilson* provides that the person challenging the affidavit must show, by a preponderance of the evidence, that "(1) that the police officer knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause." *Wilson*, 212 F.3d at 786-87 (internal quotations omitted). Once that review and correction process is complete, the corrected affidavit (assuming there were corrections to be made) simply becomes one more set of factual assertions that must then be viewed in the light most favorable to the non-movant, in the same manner as all of the other evidence is to be considered at the summary judgment stage. The existence of a factual assertion in the corrected affidavit of course does not preclude other evidence pertaining to the same topic covered by that assertion from also being considered in the summary judgment process.

Our review of the record here has not been affected by the District Court's error in this regard. Having examined the totality of the circumstances, including the glaring omissions in Evanson's affidavit, we have reached the conclusions we describe.

incident, and that Reedy's mother made arrangements for Reedy to travel to the police station the next day, on July 16, 2004. He also omitted the fact that Reedy did indeed meet with him at the station on July 16, 2004, as planned. Evanson had stated in the original Affidavit that he attempted to make contact with Reedy for several days after the incident but that she would not return his calls. He had also stated in the original Affidavit that his meeting with Reedy and her mother occurred eight days after Reedy was released from the hospital, on July 23, 2004. The Affidavit was corrected to reflect that Evanson spoke with Reedy's mother the day after the incident, and that Reedy and her mother met with him that following day, July 16, 2004.

(2) Evanson recklessly misrepresented the purpose of that meeting with Reedy at the police station, neglecting to include the fact that he also wanted to discuss the possibility that Reedy had fabricated the entire incident. Evanson had stated in the original Affidavit that the purpose of the meeting was simply to discuss the alleged assault and robbery. The Affidavit was corrected to reflect that Evanson also wanted Reedy to come to the police station to discuss the possibility that she

had committed theft and concocted the rape allegations to cover her crime.

(3) Evanson recklessly mischaracterized Reedy's reaction to his questioning as "verbally abusive" rather than being simply upset. The Affidavit was corrected to reflect that Reedy became "upset" at Evanson's line of questioning. (App. at 23.)

(4) Evanson recklessly omitted the fact that the two accounts Reedy provided to Mascellino and Farah about the attack were consistent with one another and were given in graphic detail. The Affidavit was corrected to fill in that omission.

(5) Evanson recklessly omitted the fact that the Gulf Station's panic alarm would have worked had Reedy attempted to use it, but that she may have been too distraught to use it since a gun was pointed at her at the time. The Affidavit was corrected to include that information.[25]

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25. Evanson had not included a statement about the existence of a panic alarm in his original Affidavit. He explained in his deposition that he considered Reedy's failure to press the panic alarm during the incident to be irrelevant, because it might have been due to the fact that the assailant was pointing a gun at her at the time, and thus, she might have been too distraught to reach for it.

(6) Evanson recklessly stated that Reedy described her assailant as between 28 and 31 years of age. Reedy, however, testified that she had described her assailant as in his mid-30s to early 40s, a description confirmed by the fact that she told Farah that her assailant was in his mid-30s to 40s. The Affidavit was corrected to include the latter characterization of the assailant's age.

(7) Evanson recklessly stated that Hazlett left the Gulf Station at 9:15 p.m. on the day of the incident, rather than 3:00 p.m., the time that Hazlett stated she left. The Affidavit was corrected to reflect that Hazlett left the store at 3:00 p.m.

(8) Evanson recklessly omitted the fact that he had investigated the Landmark Attack during the time he was investigating Reedy's attack. The Affidavit was corrected to include the fact that Evanson investigated a robbery and sexual assault with "several similarities" to Reedy's attack. (*Id.* at 27.)

The District Court reconstructed the Affidavit based on those several conclusions. It then weighed what it considered to be exculpatory facts in the revised Affidavit against what it considered to be inculpatory facts, and held that the Affidavit, even as corrected, still

established probable cause to arrest Reedy for false reporting and theft.

iii. *Probable Cause Analysis*

The District Court's approach was correct, but we cannot agree with its ultimate conclusion about probable cause. In general, the District Court committed four types of error. First, it erred in its reconstruction of the Affidavit because it failed to consistently interpret the record in the light most favorable to Reedy and instead, contrary to the summary judgment standard, occasionally adopted interpretations that were the least favorable to Reedy. Second, the Court cited several inculpatory "facts" to support probable cause that were not actually supported by the record. Similarly, not all of Evanson's arguably reckless omissions were actually included in the Court's reconstructed Affidavit and analysis. Third, the Court erred in deciding that certain facts were inculpatory when they were either irrelevant or even exculpatory. Finally, the Court erred when it gave little weight to the highly significant exculpatory facts that the Landmark attack, with all of its similarities to the attack on Reedy, occurred before Evanson sought to arrest Reedy and that Evanson was responsible for investigating both attacks. We explain below how these general errors manifested themselves more specifically, and why the reconstructed Affidavit, as further corrected by us, fails to establish probable cause.

Appendix A

1. Reedy's Supposed Reluctance to be Available and Evanson's Predisposition Toward Reedy

The District Court first cited as inculpatory the fact that Reedy "was unwilling to provide a firm commitment to meet with the police ... on the night in question and did not make herself available until Detective Evanson continued to press the matter with [Reedy's] parents." (App. at 31.) The Court then held that, "although [Reedy] and her parents did actually meet with Detective Evanson" the day after Reedy was released from the hospital, that fact only "weaken[s] the inferences that [Reedy] was evasive and uncooperative." (*Id.* at 31-32.) Thus, the Court held that "[t]he inference of reluctance to be available to the police was fairly raised by [Reedy's] behavior." (*Id.* at 31.)

The record, however, if viewed in the light most favorable to Reedy, does not show any lack of willingness by her to meet with the police. On the night of the attack, she immediately sought help to report it. She then, over the course of the night, provided three separate, consistent, and detailed accounts of the traumatic incident. Two of those statements were to police officers. She also agreed to take a polygraph test. The day she was released from the hospital, the earliest day she could physically travel to the police station, she and her parents met with Evanson at the station and she provided a detailed written statement that was consistent with the accounts she had given at the hospital. These are not the actions of someone trying to avoid cooperating with the police.

The Court also cited as inculpatory the fact that, when Evanson tried to contact Reedy on July 15, he was only able to reach her voicemail. On July 15, however, Reedy was still in the hospital, and Reedy's mother contacted Evanson that same day on Reedy's behalf and arranged for Reedy to go to the police station the next day. Reaching the voicemail of a person who has just been sexually assaulted at gunpoint, while that victim is still in the hospital, does not demonstrate that the victim is uncooperative, especially when the victim has a relative return the phone call the same day.

Moreover, even if Reedy had shown a reluctance to cooperate, a reasonable jury could find that such reluctance was not inculpatory but was understandable in the face of Evanson's undisguised suspicion of Reedy from practically the moment she reported the attack. The District Court correctly recognized the remarkable rapidity with which Evanson viewed Reedy as the prime suspect in the theft of the Gulf Station, but the Court nevertheless expressly declined to consider Evanson's predisposition toward Reedy to be relevant, stating that "whether Detective Evanson had a predisposition towards [Reedy] ... from the start of [the] investigation does not change the inculpatory information ... ." (*Id.* at 31.) That puzzling assertion ignores the human dynamic inherent in communication. Evanson's predisposition, which was manifested in his aggressive and insulting accusations, is certainly relevant to an interpretation of Reedy's attitude, because her actions or statements occurred in the context of, and in response to, Evanson's actions and statements. Reedy's behavior cannot be fairly analyzed without considering the behavior of Evanson to which she was reacting.

Appendix A

Evanson's investigation into the reported rape and robbery appears to have focused exclusively on the theory that Reedy was a liar and thief. The police report — and, for that matter, the entire record — indicates that, after a brief search of the woods on the night of the incident, Evanson and the other officers made no effort to locate Reedy's assailant or to consider anyone but Reedy and Watt as suspects, even after the Landmark Attack.[26] As Reedy tells it, the night she was attacked, while she was still in the hospital and after she had given Evanson a detailed description of the events that matched what she had already told Mascellino, and before Evanson had done any further investigation, he called her a liar and repeatedly accused her of stealing the money from the store.

In short, we are mindful that we must view the record in the light most favorable to Reedy. The fact that Reedy reported the assault immediately, provided three consistent and detailed accounts of it,[27] traveled

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26. *See infra*, Section III.iii.7.

27. The District Court corrected Evanson's original Affidavit to reflect that Reedy had provided two separate detailed accounts of the assault to Mascellino and Farah, and that those accounts were consistent with one another. The Court cited that as exculpatory. We agree it is exculpatory, but note that the record actually reflects that Reedy provided three graphic accounts of the assault on the night of the incident — to Mascellino, Farah, and Evanson — and that all three accounts were consistent with one another. Accordingly, in reconstructing the Affidavit and analyzing it for probable cause, the District Court should have included and considered all three accounts.

to meet with Evanson the day after she was released from the hospital, provided another detailed statement in writing, and did all of this in the face of Evanson's repeated accusations against her, shows a willingness to work with law enforcement rather than an "evasive" or "uncooperative" attitude. Accordingly, the District Court's characterization of Reedy's behavior as inculpatory is clearly wrong.

2. The Cash Register and the Assailant's Exit

The District Court regarded as inculpatory Reedy's failure to provide any information about how her assailant arrived at the gas station or in what direction he went when he left the scene. At the same time, however, the District Court found Reedy's knowledge about the precise time the cash register was opened to be inculpatory, because it seemed suspicious to the Court that she could remember such detail. The District Court thus placed Reedy in a memory trap: she implicated herself by noticing and remembering certain details about the attack, but also implicated herself by not noticing or remembering other details. Leaving aside the fact that a reasonable jury could conclude that people often remember some details but not others, the District Court's conclusion is inapposite because, again, it casts the evidence in an unfavorable light for Reedy. It does not take much generosity to consider that Reedy may have been unaware of her attacker until he was already in the store. Hence, not knowing the direction he came from is hardly inculpatory. Reedy could not

describe the direction that her assailant left the scene because she remained in the backroom of the station at the time he left, just as he had ordered. If the evidence is viewed in her favor, these interpretations must be given their due and the inculpatory conclusion reached by the District Court falls away.

3. The Panic Alarm and Counseling

The District Court thought it inculpatory that Reedy had failed to push the panic alarm while a gun was being pointed at her,[28] and that she had declined professional counseling when it was offered to her. Specifically, the Court held that Reedy's

> declining professional counseling after it was offered repeatedly and the fact that she did not attempt to press the panic alarm at any time during the events happening behind the counter in the front room, while susceptible of innocent explanation, add to the quantum of information supporting a finding of probable cause.

(App. at 34 n.7.)

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28. Evanson's police report states that the perpetrator "pulled a black semi-automatic handgun from the waist band of his pants and proceeded to point said gun at victim." (App. at 350.) Reedy said that he "pointed his gun at the left side of [her] head." (*Id.* at 460-61.)

Here again, the District Court erred in its application of the summary judgment standard. It explicitly recognized that there are two reasonable interpretations of Reedy's conduct, stating that Reedy's conduct is "susceptible of innocent explanation." (*Id.*) However, it then adopted the least favorable interpretation for Reedy, which is contrary to the requirement that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

More specifically, the District Court's implication that there is a duty to attend counseling is incorrect. There is no such duty. Moreover, implicit in the Court's conclusion that an inculpatory inference can be drawn from Reedy's decision not to attend counseling is a value judgment about how victims ought to respond to trauma. That is a highly debatable judgment, lacking any foundation in the record. Even if there were some basis for saying that refusing counseling is inculpatory, Reedy explained why she did not want counseling, saying that her earlier experience with sexual abuse would allow her to handle the trauma. When confronted, as the District Court evidently believed it was, with two explanations for Reedy's decision to refuse counseling — either she was lying about the assault or she believed counseling was not necessary — the Court chose to operate on the least favorable interpretation of the evidence. That was error. Likewise, Reedy's failure to reach for a panic alarm when a gun was pointed at her and she was being

sexually assaulted, which are the facts we must accept at this stage, is not in the least inculpatory.[29]

4. The Security Alarm System

The District Court focused heavily on events related to the security alarm system. Of the several assertions of fact cited by the Court as inculpatory, the following five involved the security alarm system:

(1) the power to the alarm system was disabled approximately 20 minutes before the attack;

(2) the system had been unplugged from its socket behind a desk in the Gulf Station's rear office;

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29. The District Court's statement about the panic alarm is also troubling because it is based on the assumption that a victim must engage in active forms of resistance during a sexual assault, even if that resistance threatens personal safety. *See State ex rel. M.T.S.*, 129 N.J. 422, 609 A.2d 1266, 1271 (N.J. 1992) (discussing how historically "[c]ourts assumed that any woman who was [sexually assaulted] necessarily would resist to the extent of her ability"). Under Pennsylvania law, to which Evanson was presumably looking in drafting his Affidavit, that assumption is not legally permissible, because, in 1976, the Commonwealth enacted a statute stating that a sexual assault victim's lack of resistance is not relevant. *See 18 PA. CONS. STAT. § 3107*. By the District Court's reasoning, however, it was appropriate for Evanson to presume that Reedy was lying because she did not press a panic alarm while a man pointed a gun at her and sexually assaulted her. That reasoning amounts to a return to considering a victim's lack of physical resistance to be legally significant.

(3) Reedy stated that her attacker was not in the area where the plug to the alarm system was located;

(4) Reedy admitted that her attacker did not disable any lines for electricity or the alarm system, and;

(5) when asked about the alarm system and why the power would have gone out twenty minutes before the attack, Reedy became upset and stated that she wanted the whole thing to go away.

The Court drew these assertions of fact from Evanson's reply brief in support of summary judgment, despite that brief's failure to contain any citations to the record. The record actually does not align with Evanson's assertions or with the description provided by the District Court on the last three of those five points. As to the third point, Reedy's assailant forced her into the back room where he ordered her to disable the telephone lines. Thus, the assailant was in fact in the area where the plug to the alarm system was located, and Reedy never stated otherwise. As to the fourth, Reedy never admitted that her attacker did not disable the alarm system; rather, she told Evanson that she did not know how the power to the alarm system was disabled. As to the fifth, Reedy's statements — "I just want this whole thing to go away" and "I just want to drop the whole thing" — were made while she was being accused by Evanson of being a liar and a thief. The

District Court's discussion of these statements as inculpatory assumes that a jury could draw only one conclusion from Reedy's statements: that Reedy had a guilty conscience about the matter. But contrary to that, a reasonable jury could plausibly conclude that, at the time Reedy made those statements, she could tell that Evanson was going to make her life unpleasant and so she naturally "wanted this whole thing to go away." (App. at 198 ¶ 48.) This again reflects a failure to "construe [the evidence] in the light most favorable to the party opposing summary judgment." *Anderson*, 477 U.S. at 261 n.2. In short, points 3, 4, and 5 on the list of factual assertions regarding the alarm system are not supported by an appropriate view of the record.[30]

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30. Moreover, as Reedy notes, if she had intended to disable the power to the alarm to support a fabricated story of rape and robbery, she could have done at least one of the following:

> (1) blamed her assailant for disabling the alarm, especially in response to Evanson's questions about the alarm; (2) reported the attack to have occurred at about the same time as the disabling of the alarm; and/or (3) reported to the police that she was unable to use the alarm/panic button because it had been disabled.

(Appellant's Opening Br. at 41.) That she did none of these things arguably cuts against the view that she fabricated her story. On this record, although Reedy has not proffered an explanation for how the alarm system was disabled, a reasonable jury could conclude that she was genuinely unaware of what had occurred with the system.

5. The Remaining Inculpatory Facts

The District Court noted other facts that it considered to be inculpatory but which bear innocent explanation. First, the Court pointed out that Reedy was the sole employee on the premises when the incident occurred. While perhaps inculpatory in the sense that Reedy had an opportunity to commit the crime, her being alone is also consistent with her being a victim of assault, as a jury could conclude that an assailant would chose to rob a gas station convenience store relatively late at night precisely because he might assume it would be staffed by a single employee.

Second, the Court noted that Watt arrived at the scene shortly after the incident was reported and later had cash for a deposit of $165.00 for the rental of a mobile home, just a few days after the incident. The implication is that Reedy had arranged for Watt to arrive at the Gulf Station as part of a scheme to transfer the stolen cash to him. But Watt arrived at the scene after the police were already there, and, according to Reedy, in response to her urgent call. Moreover, she stated that Watt typically picked her up after her shift ended and so he would have arrived at the scene near that time anyway, since the incident occurred when Reedy's shift was ending. We also cannot agree with the District Court that making a $165.00 deposit is necessarily inculpatory. Even assuming that Reedy had no money for the rental deposit, the record is silent about Watt's financial status and whether he had legitimate access to funds for the deposit. In short, without more facts — and, particularly

at the summary judgment stage, where the only permissible inferences are ones in favor of Reedy — Watt's and Reedy's payment of $165.00 has little, if any, inculpatory value.[31]

6. The Drug Testing

Evanson's briefing before us emphasizes that Reedy had used drugs and claims that her "lying about her use of marijuana and diazepam justified [his] suspicion and reinforced the theory that [Reedy] was involved in the removal of the money." (Appellees' Answering Br. at 37.) However, Evanson did not include in his original Affidavit any reference to Reedy's use of marijuana or other drugs, or to her alleged lying about drugs, suggesting that, despite his present rationalization, he did not believe that the information was relevant to probable cause.

Moreover, at least as to her marijuana use, Reedy appears to have been forthcoming to both Evanson and Farah, acknowledging that she had used marijuana several days before the incident. Evanson has failed to explain how a positive urine test for marijuana is inconsistent with Reedy's statement of when she had

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31. Hazlett stated in her deposition that a week prior to the incident, Reedy told her that she and Watt needed a $600.00 down payment for a trailer that they wanted to purchase. However, because Hazlett did not reveal this information until her deposition, no reference to this fact is contained in the police report or the Affidavit, and it played no part in Evanson's probable cause analysis.

used marijuana, and, thus, he has not explained why marijuana testing led him to question Reedy's credibility. To the extent he is implying that marijuana could only be detected by the test if the use had been more recent, Evanson has referenced nothing to support that conclusion.

As to the diazepam, the evidence of Reedy's denying drug use is more equivocal. Evanson says that, when he asked Reedy if she had consumed any narcotics, she answered that she had not, but that later he discovered she had taken a diazepam. According to Evanson, this demonstrates that Reedy had lied to him. That, of course, assumes that Reedy understood the word "narcotic" to include diazepam. Evanson also says that when he asked Reedy about her marijuana consumption, she responded that, while she had smoked marijuana, she had taken no other medication. If Reedy made the statement that she had taken no other medication, that could surely be viewed as inconsistent with her admission that she had taken a diazepam. However, there is a question about whether Evanson's account of the conversation is accurate, because of evidence that indicates that it was inserted into the police report after the fact.[32] More importantly, it bears re-emphasis that

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32. The only evidence of this conversation between Evanson and Reedy is found in Evanson's police report entries. The police report indicates that this information was entered by Evanson on July 15, 2004, the day after the incident. However, according to Reedy, defendants produced electronic backup files of the police report, which revealed that Evanson's question to Reedy about narcotics usage was inserted into the police report

(Cont'd)

the issue of Reedy's drug use was evidently not a part of Evanson's probable cause determination, because he did not mention Reedy's drug use in the Affidavit.

7. The Landmark Attack

Prominent among the problems with the District Court's probable cause analysis is the way that it addressed the Landmark attack. While recognizing that Evanson's failure to include any mention of that attack in the Affidavit was a reckless omission, the Court nevertheless concluded that, while the Reedy and Landmark attacks "share general similarities[,]... [s]uch details neither add to nor subtract from the probable cause determination." (App. at 26.) That conclusion is unsustainable because it ignores the marked similarities of the attacks and the fact that Reedy was charged with fabricating the entire incident at the Gulf Station.

The several similarities between the Landmark attack and the attack on Reedy constitute material omissions that should have been included by the District

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(Cont'd)

on September 1, 2004. By September 1, 2004, Evanson had obtained the results of the toxicology report and had confronted Reedy with those results. Reedy says she explained to Evanson that Watt had given her diazepam to relax after the assault. Reedy thus suggests that, since Evanson "was aware of Reedy's truthful and eminently reasonable explanation" for both the diazepam and the marijuana, Evanson knew that he could only suggest Reedy was untruthful if he "specifically referred to the use of prescription or non-prescription drugs ... ." (Appellant's Reply Br. at 12.)

Court in the reconstructed Affidavit. Once included, they significantly undermine the conclusion that there was probable cause to arrest Reedy for theft, receiving of stolen property, and filing a false report.

Not only are the similarities between the attacks objectively apparent, the attacks may have been subjectively connected in Evanson's mind prior to the time he arrested Reedy. That is at least a fair inference when the record is viewed in Reedy's favor, though Evanson denies it. On October 13, 2004, approximately three months after the attack on Reedy, the Landmark victim reported being attacked by someone of the same general description as Reedy's assailant, who used a similar weapon, and who forced her at gunpoint to allow him to fondle her breasts and to perform oral sex on him. The Landmark attack, which took place less than two miles from the Gulf Station and at practically the same time of night as Reedy's attack, was the only other reported sexual assault in Cranberry Township in 2004. It was also assigned to Evanson as the lead investigator. Nevertheless, when Evanson filed his Affidavit against Reedy on January 14, 2005, he did not mention the Landmark attack and there is no indication in the record that he investigated any relationship between the two incidents, or that he even considered the similarities between the two attacks. When Evanson was asked in his deposition, "[w]hat information would you have needed to link the Reedy rape and the Landmark rape?", he responded that the "only things that could have

linked" the two incidents in his mind would have been a confession from the assailant or a DNA match. [33] (*Id.* at 219, p. 520.)

Regardless of the credibility of that claimed level of cluelessness, the record indicates that Evanson eventually did recognize the connection between the two attacks. On January 14, 2005, the same day that he filed the criminal complaint against Reedy, Evanson learned from the State Police that the Landmark attack was linked, by DNA, to other attacks throughout Pennsylvania, and that those attacks were believed to have been committed by a serial rapist. Also that same day, Evanson sent a copy of the Landmark police report to another town's police department via fax, with the subject line "Serial Rapist." Soon thereafter, in late January or early February, Evanson gave details about the Reedy attack during a teleconference conducted by a State Police task force organized to catch that serial rapist. Finally, sometime later in February, Reedy contacted the State Police through a tip line established to obtain information regarding the serial rapist, and she advised them that she had been charged with making a false report. On May 9, 2005, while charges were still pending against Reedy, Evanson heard from the State Police that Reedy had contacted them on the

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33. Even on appeal, Evanson continues to say that he never once thought to connect the two crimes, because "[f]rom [his own] perspective ... only a confession or a DNA match would have linked the Landmark and the Reedy incidents." (Appellees' Opening Br. at 15.)

rape tip line. Despite all this, the record does not reveal that Evanson ever reconsidered Reedy's arrest or made any effort to investigate whether the Landmark and Reedy attacks were related. [34]

Particularly telling as to probable cause is the deposition of Corporal George Cronin of the State Police, who led the statewide task force. After comparing the police reports in the Reedy attack and the Landmark attack, Cronin testified that the similarities between the two attacks "seemed to be fairly obvious," and he answered "yes" when asked whether he would expect a detective who was investigating both crimes, as Evanson was, "to recognize those similarities." (App. at 626.)

The District Court minimized Cronin's testimony and the similarities between the attacks, saying that Evanson had no constitutional duty to further investigate in the hope of finding exculpatory evidence. Assuming that were true, it is beside the point. No further investigation was needed to reach the conclusions expressed by Cronin. All that was required was a simple comparison of the police reports in the two cases, both of which were written by Evanson. On the very day he filed the Affidavit, he participated in a discussion of the Landmark attack as the work of a serial

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34. We note these post-arrest events not because they figure into an analysis of probable cause at the time the arrest took place but because they may be seen as indicative of Evanson's closed mind throughout the entire set of events, if one views all of the evidence in Reedy's favor.

rapist. Again taking the view of the record required at this stage, Evanson's failure or refusal to compare the two attacks he was investigating — stating that only a DNA match or a confession would link the two attacks — demonstrates that he chose to "disregard plainly exculpatory evidence," *Wilson*, 212 F.3d at 790, and that he created the "unnecessary danger of unlawful arrest," *Malley v. Briggs*, 475 U.S. 335, 345, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

v. *Probable Cause Conclusion*

In sum, within hours of the attack on Reedy, Evanson concluded that Reedy had fabricated the robbery and sexual assault. Three months later, another robbery and sexual assault occurred involving substantial similarities to the attack on Reedy. The later attack was identified as the work of a serial rapist. Despite that, Evanson declined to consider that the two attacks were linked. Six months after Reedy reported that she had been robbed and assaulted at the Gulf station, Evanson arrested her on the same theory he had formed the night that he met her at the hospital. Taking all inferences in favor of Reedy, a reasonable jury could conclude that, at the time the arrest was made, the facts and circumstances within Evanson's knowledge were not sufficient "to warrant a prudent man in believing that [the suspect] had committed ... an offense." *See Wright v. City of Phila.*, 409 F.3d 595, 602 (3d Cir. 2005) (first alteration in original) (internal

quotations omitted).[35] Accordingly, on this record, viewed in Reedy's favor, it was error for the District Court to hold that Evanson had probable cause to arrest Reedy.

vi. *Qualified Immunity*

The District Court held in the alternative that, even if there was no probable cause, Evanson is entitled to qualified immunity. The burden of establishing entitlement to qualified immunity is on Evanson. *See Harlow v. Fitzgerald*, 457 U.S. 800, 808, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court established a two-part test to determine

35. Evanson attempts to analogize the present case to *Wright*, 409 F.3d at 595. However, *Wright* is significantly distinguishable. The plaintiff in *Wright*, after being sexually assaulted by two men, returned to the house where she was attacked and broke into that house to retrieve her belongings. *Id.* at 597. While there, she took other items that did not belong to her. *Id.* Wright was charged with burglary, theft, criminal trespass, and criminal mischief. *Id.* at 596. Those charges were later dropped for failure to prosecute. *Id.* at 598. Wright then filed a § 1983 claim for false arrest. *Id.* We held that the officers had probable cause to arrest Wright for criminal trespass on the basis that she admitted to the police that she had broken a window, entered the house, and removed items from the house. *Id.* at 603. Unlike Wright, who admitted to having committed elements of the crimes charged, Reedy has never admitted to any crime, but rather has argued consistently that, at the time of her arrest, there was no probable cause to believe that she committed any element of any of the offenses for which she was charged.

if a defendant can be shielded by qualified immunity. First, we must ask whether, "[t]aken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right[.]" *Id.* at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If, however, the facts read in the light most favorable to the plaintiff show a violation of a constitutional right, as they do here because an arrest was made without probable cause, we must ask "whether the right was clearly established ... in light of the specific context of the case ...." *Id.* A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[36] *Id.* at 202. A defendant police officer "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue ... ." *Malley*, 475 U.S. at 341.

For the reasons described above, it must be said that, viewing the evidence from Reedy's perspective, "no reasonably competent officer would have concluded

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36. While *Saucier* mandated that a court must first determine whether a constitutional right had been violated before asking whether the right was clearly established (i.e., whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted), the Supreme Court has recently clarified that lower courts have discretion to determine the order of the qualified immunity analysis in order to avoid unnecessary analysis of challenging constitutional questions. *See Pearson v. Callahan*, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

that a warrant should issue" when it did for her arrest for making a false report of the rape, for theft, and for receiving stolen property.[37] *See Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996) ("[C]rucial to the resolution of any assertion of qualified immunity is a careful examination of the record ... to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant viewed in a light most favorable to the plaintiff.") (internal punctuation omitted). The District Court thus erred in granting summary judgment on the basis of qualified immunity.[38]

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37. Further, qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions. *See Gilles v. Davis*, 427 F.3d 197, 207 (3d Cir. 2005) ("Under qualified immunity, police officers are entitled to a certain amount of deference for decisions they make in the field [because they] must make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." (internal quotations omitted)). There were no "split-second" decisions made in this case. The Reedy attack occurred on July 14, 2004, the Landmark attack occurred on October 13, 2004, and Evanson did not file the Affidavit against Reedy until January 14, 2005, five months after ceasing his investigative efforts into Reedy's case.

38. Qualified immunity was discussed by the District Court only with respect to Reedy's § 1983 claims concerning her arrest (i.e., her claims of unlawful seizure, false imprisonment, and malicious prosecution). Our decision on qualified immunity as to those claims is solely that it is not warranted at the summary judgment stage in this case. Qualified immunity remains a viable defense, though its applicability cannot be finally determined until after the facts have been sorted out at trial. With respect to Reedy's other § 1983 claim — her unlawful search claim — we make no comment on the availability of qualified immunity as it may pertain to that claim.

Appendix A

B. *Unlawful Search: The Blood Claim*

i. *Background*

As earlier discussed, Evanson directed the hospital to perform drug testing on blood samples taken from Reedy as part of her rape kit examination. The test results, which Evanson obtained eight days later through a search warrant, revealed that Reedy had ingested diazepam and confirmed that she had used marijuana.

Reedy contends that, under Fourth Amendment standards, Evanson conducted an unreasonable, warrantless search of her blood by ordering the drug screening.[39] Evanson does not argue that he had a warrant to search Reedy's blood, but rather argues that Reedy consented to the search, or alternatively, that she had no reasonable expectation of privacy in her blood because it had left her body. The District Court held that the Fourth Amendment's protections apply only to intrusions below the bodily surface, and that Reedy thus lost any reasonable expectation of privacy in her blood after she consented to having it drawn as part of her rape kit. The Court alternatively held that the drug screening Evanson ordered fell within the scope of the authorization form that Reedy had signed. On appeal, Reedy challenges both of those conclusions.

39. No one appears to be disputing that Evanson had probable cause to believe that the blood would reveal that Reedy had used a controlled substance. Indeed, Reedy had admitted that she had smoked marijuana. Rather, the issue is that he conducted a warrantless search.

We address the consent issue before considering whether Reedy had a reasonable expectation of privacy in her blood, because, if Reedy consented to having her blood searched for drugs, there is no need to ask whether she had a reasonable expectation of privacy in the blood that was drawn.

ii. *Consent*

The Fourth Amendment's protection proscribes only government action. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). Although the medical personnel who drew and tested Reedy's blood are not government actors, because the personnel acted at Evanson's direction, they were effectively acting as agents of the government. *See Lustig v. United States*, 338 U.S. 74, 79, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) (indicating that evidence procured with the participation of government actors implicates the Fourth Amendment).

As a general matter, "warrantless searches . . . are *per se* unreasonable under the Fourth Amendment." *United States v. Silveus*, 542 F.3d 993, 999, 50 V.I. 1101 (3d Cir. 2008). "However, there are several exceptions to this rule." *Id.* One of those exceptions is consent, which, if given voluntarily, authorizes a warrantless search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

"When an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980). The standard for measuring the scope of a person's consent is "objective reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991); *United States v. Baker*, 221 F.3d 438, 447 (3d Cir. 2000) (same). We must ask "what ... the typical reasonable person [would] have understood by the exchange" through which consent was obtained. *Jimeno*, 500 U.S. at 251; *see also United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990) (describing how "the scope of a permissible search is not limitless ... [but is r]ather ... constrained by the bounds of reasonableness[.]"). Consent is "determined from the totality of the circumstances ... [and] we must examine the circumstances surrounding [the] consent ... ." *United States v. Antoon*, 933 F.2d 200, 203-04 (3d Cir. 1991). Here, those "circumstances" involve Reedy undergoing a rape kit examination.

While at the hospital, Reedy signed two consent forms before her blood was drawn for the rape kit. The first form,[40] titled "AUTHORIZATION FOR COLLECTION AND RELEASE OF EVIDENCE AND INFORMATION," provides the following:

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40. We say "first" only for convenience in referring to the two forms. While both of the forms were signed on July 15, 2004, the order in which they were signed is not clear from the record.

Appendix A

I, Sara Reedy, freely consent to allow Dr. Jones, M.D., his medical and nursing assistants and associates to conduct an examination *to collect evidence concerning an alleged sexual assault.* This procedure has been fully explained to me and I understand that this examination will include tests for the presence of sperm and sexually transmitted diseases and infectious diseases, as well as clinical observation for physical evidence of penetration of or injury to my person, or both, and the *collection of other specimens and blood samples for laboratory analysis.*

I fully understand the nature of the examination and the fact that medical information gathered by this means may be used as evidence in a court of law or in connection with enforcement of public health rules and law.

I do ... authorize the hospital and its agents to release the laboratory specimens, medical records and related information pertinent to this incident, including any photographs, to the appropriate law enforcement officials, and I herewith release and hold harmless the hospital and its agents from any and all liability and claims of injury whatsoever which may in any manner result from the authorized release of such information.

(App. at 274 (emphasis added).)

Appendix A

The second consent form, titled "CONSENT FOR RAPE EXAMINATION," provides the following:

> 1. I, Sara Reedy, hereby authorize Dr. Jones to perform a medical exam, including, but not limited to, a pelvic (internal) exam on my person and to record for the proper law enforcement agency and personal legal council [sic] his/her findings as related to the prosecution of my assailants.
>
> 2. I authorize the collection of necessary specimens for laboratory test [sic] *as related to my case.*
>
> 3. Any questions I had regarding the procedure(s) have been answered to my satisfaction.

(*Id.* at 525 (emphasis added).) The District Court held that the "toxicology [drug] screening would fall within the scope of the [first form], which included 'the collection of other specimens and blood samples for laboratory analysis.'" (*Id.* at 42 (quoting App. at 274).) That was the only statement the Court made to support its conclusion that the testing Evanson ordered fell within the scope of Reedy's consent. Evanson argues that the forms "obviously allowed plaintiff's blood to be drawn and tested for drugs, and the results shared with the police," (Appellees' Answering Br. at 48,) but beyond that ipse dixit, offers no explanation as to why the forms

authorized Reedy's blood to be searched for evidence of drug use.

Having examined the language of the consent forms from the perspective of an objectively reasonable person in Reedy's circumstances, *Baker*, 221 F.3d at 447, we conclude that someone who had not been accused of committing any crime and who had arrived at the hospital to be examined for the purpose of evaluating the extent of her injuries and risk of disease from a sexual assault, and for the purpose of gathering physical evidence to prosecute her assailant, would not understand that she was also consenting to having her blood tested a second time, at the direction of a law enforcement agent, for the purpose of collecting evidence to prosecute her.[41]

The first consent form states that Reedy is agreeing to an "examination *to collect evidence concerning an alleged sexual assault*." (App. at 274 (emphasis added).) An objectively reasonable person in Reedy's situation would likely understand this phrase to limit her consent to the collection of evidence regarding the prosecution of her sexual assailant. Drug use had not been raised as being relevant to the sexual assault at the time that

41. We are not suggesting that hospital personnel, acting on their own, would have been constrained by the terms of the authorization forms from subjecting Reedy's blood sample to a toxicology screen. We need not and do not address that issue. We are concerned here only with the application of Fourth Amendment principles.

Reedy signed the form.[42] It cannot fairly be said, then, that an objectively reasonable person would understand that drug use "concern[ed]" the sexual assault when Reedy made the decision to consent.

The second form, by its title — "CONSENT FOR RAPE EXAMINATION" — identifies the scope of Reedy's consent, namely, that she was agreeing to a rape examination. In that form, Reedy authorized "the collection of necessary specimens for laboratory tests *as related to my case.*" (*Id.* at 525 (emphasis added).) For the reasons described above, from a reasonable person's perspective, Reedy's sexual assault case was about sexual assault, not drug use. Again, at no time during Reedy's dealings with the police or the hospital prior to her signing the forms, did anyone discuss drug use with her. As a result, at the time Reedy signed that form, she could not have been expected to understand that she was consenting to have law enforcement direct the testing of her blood to show illegal drug use.[43]

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42. From Evanson's police report, it appears that evidence regarding the urine samples was shared with him during his conversation with Reedy, thus indicating that Reedy had signed the forms prior to speaking with Evanson.

43. Evanson argues that the information about drug use "could have been used ... to help prove or disprove [Reedy's] sexual assault claim." (Appellees' Answering Br. at 48.) No reasoning is provided as to how drug use would have any bearing on the competing factual scenarios in play here, and we can perceive none. Evanson also indulges in a non-sequitur, suggesting that it "does not matter" that he had not yet discussed drug usage with Reedy because he "had begun to

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In sum, we conclude that the text of these two authorization forms is insufficient to show that Reedy consented to having a law enforcement officer order medical personnel to search her blood for evidence of drug use for the purpose of incriminating her, something that is wholly apart from the sexual assault at issue here.

iii. *Expectation of Privacy and Consent*

The District Court also held that Reedy lost any reasonable expectation of privacy after she consented to having her blood drawn as part of the rape kit, because any subsequent testing on that blood "did not involve an intrusion below [her] bodily surface." (App. at 42.) That holding wrongly discounts the limits of Reedy's consent, effectively rendering those limits a nullity once law enforcement had access to otherwise private material.

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formulate ... a theory inculpating [Reedy]." (*Id.*) When analyzing the scope of consent, the test is the objectively reasonable meaning of the communication between the person obtaining consent and the person who has supposedly consented. *See Baker*, 221 F.3d at 447. It is not what an individual police officer's inner thoughts happen to be.

Evanson further argues that if Reedy "had any qualms about what she was authorizing, she could have refused to sign the forms ...." (*Id.*) However, Evanson does not suggest what about the forms should have given Reedy qualms. While competent adults have the duty to read consent forms carefully, there is no duty to be skeptical that one might be consenting to something not mentioned in the forms.

Beyond that, the District Court's analysis misapprehends the privacy rights at stake. "A legitimate expectation of privacy exists when the individual seeking Fourth Amendment protection maintains a 'subjective expectation of privacy' in the area searched that 'society [is] willing to recognize ... as reasonable.'" *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (alterations in original) (quoting *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)); *see also United States v. Hartwell*, 436 F.3d 174, 178 n.4 (3d Cir. 2006) ("[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." (quoting *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001))). In *Schmerber v. California*, the Supreme Court held that blood "testing procedures plainly constitute searches of 'persons' ... within the meaning of [the Fourth] Amendment." 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The Court noted that the "intrusions beyond the body's surface" implicate the "interests in human dignity and privacy which the Fourth Amendment protects ... ." *Id.* at 769-70. The Court reasoned that this was so because "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 767. The District Court in this case cited to *Schmerber* but concluded that the Supreme Court intended to give Fourth Amendment protection only to "forced invasions below the body surface ... ." (App. at 41.)

To support that reading, the District Court cited our decision in *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 139 (3d Cir. 1982), in which we held that the seizure of "facial and head hair" did not constitute a search or seizure protected by the *Fourth Amendment* because the evidence was "on public view." In that case, we distinguished hair samples from "blood samples, ... [where, unlike hair samples] the bodily seizure requires production of evidence below the body surface which is not subject to public view." *Id.* The District Court took our words to mean that the Fourth Amendment protects blood only when it is "below the body surface" (App. at 41), and held that Reedy had no claim because the "*Fourth Amendment* provides no protection for what a person knowingly exposes to the public." (*Id.* (internal quotations omitted).) The Court also analogized Reedy's case to *United States v. Dionisio*, 410 U.S. 1, 8-9, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), in which the Supreme Court held that requiring a witness to produce voice exemplars did not violate the Fourth Amendment because someone's voice is exposed to the public.

The District Court's analogies fail because, unlike one's voice or hair, blood is not exposed to the general public, not even after it has been drawn for medical testing. Agreeing that the data produced by a blood test can be shared with law enforcement for the purpose of prosecuting a rapist is not tantamount to the unrestricted public exposure of the blood sample in the way people typically expose their voice or hair. While we did remark in *Mills* that the taking of blood samples requires an intrusion below the body surface, 686 F.2d

at 139, we noted that fact only to illustrate why blood samples, as compared to hair samples, were not "on public view." Similarly, in *Schmerber*, while the Supreme Court noted that the taking of blood involves intrusion beyond the body's surface, it did not say that the blood, once drawn, is no longer subject to a reasonable expectation of privacy. Instead, the Court held that blood "testing procedures plainly constitute searches of 'persons' ... within the meaning of [the Fourth] Amendment." 384 U.S. at 767. That holding makes sense, given that an "overriding function of the Fourth Amendment is to protect personal privacy and dignity ... ." *Id.*

However, if there were any doubt about the breadth of the Supreme Court's holding in *Schmerber*, it is dispelled by the Court's subsequent decision in *Ferguson v. City of Charleston (Ferguson I)*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), and the decision of the United States Court of Appeals for the Fourth Circuit in that case on remand, *Ferguson v. City of Charleston (Ferguson II)*, 308 F.3d 380 (4th Cir. 2002). In *Ferguson I*, a state hospital began performing drug tests on the urine samples of obstetric patients that met certain criteria. 532 U.S. at 71 & 72 n.4. The hospital then shared the results of those tests with law enforcement. *Id.* at 72. Several women who were arrested after their urine tested positive for cocaine filed suit, claiming that the drug tests on their urine were unconstitutional searches. *Id.* at 73. The state defended on the basis "(1) that, as a matter of fact, petitioners had consented to the searches; and (2) that, as a matter

of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes [or the 'special needs' doctrine]." *Id.*

The Supreme Court addressed the second of those two defenses, and compared the case to previous ones in which drug testing had been allowed based on the "special needs" exception. It specifically cited drug testing of U.S. Customs Service employees as part of their being considered for promotion, and testing of high school students as a condition of their participating in extracurricular activities. *Id.* at 77. The Court noted that the invasion of privacy suffered by the *Ferguson* plaintiffs was far more substantial than the privacy invasions in the "special needs" cases because, in the special needs cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties." *Id.* at 78. Moreover, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* The Court further "recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care." *Id.* at 78 n.14. The Court then remanded the case to the Fourth Circuit for consideration of the scope of the patient's consent. In so doing, the Court specifically admonished that "when [medical personnel] undertake to obtain ... evidence

from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights ... ." *Id.* at 85 (emphasis in original).

On remand, the Fourth Circuit first explained that it was "abundantly clear" from the Supreme Court that "any finding of informed consent must rest on a determination that Appellants had knowledge, from some source, that no medical purpose supported the testing of their urine for cocaine; further, Appellants must have understood that the tests were being conducted for the law enforcement purpose of obtaining incriminating evidence." *Ferguson II*, 308 F.3d at 397. The Fourth Circuit considered critical the question of whether the patients "understood that the request was *not* being made by medical personnel for medical purposes, but rather by agents of law enforcement for purposes of crime detection." *Id.* (emphasis added). After analyzing the relevant language of the consent forms, the court held that

> [nothing] in either form [] advised or even suggested to Appellants that their urine might be searched for evidence of criminal activity for law enforcement purposes. Rather, to the extent the forms alerted Appellants to the possibility that their urine would be tested for drugs, Appellants were led to believe that such tests would be conducted only if an Appellant's treating physician deemed such

> a test advisable in the particular circumstances of that Appellant's medical care.... [T]here is no evidence that *any* of the urine drug screens were conducted as a result of a doctor's independent medical judgment ... .

Id. at 399. The court thus concluded that, "as a matter of law, neither ... consent form could serve as sufficient evidence of Appellants' informed consent to the searches." *Id.* Implicit in the Fourth Circuit's holding is that the patients had a reasonable expectation of privacy in urine samples taken from them at the hospital for medical purposes.

As in *Ferguson I* and *Ferguson II*, an important inquiry about the blood samples at issue here is whether Reedy understood that her blood was being tested for the law enforcement purpose of obtaining incriminating evidence against her. The answer seems plainly to be no. She consented to having her blood drawn in the context of a rape kit examination. She had just been sexually assaulted and was being tested for sexually transmitted diseases and for potential evidence concerning her assailant. She indisputably had a reasonable expectation of privacy in her blood when it was drawn, and she did nothing to forfeit that expectation.

The Fourth Amendment protects against unreasonable government intrusion into the personal and private aspects of life. There is little that is more personal than an individual's bodily integrity. *See*

Schmerber, 384 U.S. at 772 ("The integrity of an individual's person is a cherished value of our society.") Consequently, Evanson's warrantless search of Reedy's blood for drug use, without Reedy's consent, violated the Fourth Amendment.[44] The District Court's conclusion to the contrary was error.

C. *Claim Against Mannell*

In her amended complaint, Reedy named Mannell, the Public Safety Director for Cranberry Township, as a defendant in all of her federal claims. The District Court granted summary judgment to Mannell. Reedy argues that the District Court erred in finding that supervisory liability should not attach to Mannell. [45]

44. Were it otherwise, victims of violent crime might be deterred from receiving much-needed medical care and from providing the physical evidence necessary for law enforcement to apprehend and prosecute those who commit such crimes. *Cf. Ferguson I*, 532 U.S. at 78 n.14 (warning that such an intrusion on a reasonable expectation of privacy "may have adverse consequences because it may deter patients from receiving needed medical care").

45. In granting summary judgment to Mannell, the District Court cited to *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and stated that Reedy had failed "to meet the standards needed to impose liability" against Mannell under that case, which deals with liability arising from constitutional violations as a result of governmental custom or policy. (App. at 43.) However, when discussing Mannell's potential liability, the parties focus on traditional principles of supervisory liability against Mannell as an individual, rather than on *Monell* liability. Accordingly, we analyze Mannell's potential liability under the doctrine of supervisory liability, as set forth in *Baker v. Monrou Township*, 50 F.3d 1186, 1190-91 (3d Cir. 1995).

In order to establish supervisory liability, Reedy must show that Mannell "participated in violating [her] rights, or that he directed others to violate them, or that he, as the person in charge ..., had knowledge of and acquiesced in his subordinates' violations." *Baker v. Monrow Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Reedy claims that "Mannell not only supervised, ratified and approved Evanson's investigation and charging of Reedy, but also participated along with Evanson in the events leading up to and following Reedy's arrest." (Appellant's Opening Br. at 50.) Mannell explained in his deposition that he is generally kept abreast of how investigations are going and that he is usually notified by a detective when a decision is made to take criminal charges to an Assistant District Attorney for review. However, he does not review the charges before they go to a prosecutor. With regard to Reedy's prosecution, Mannell was Evanson's supervisor during the relevant time, and Evanson kept Mannell abreast of "significant points" (App. at 569), but there is no evidence that Mannell directed Evanson to take or not to take any particular action concerning Reedy that would amount to a violation of her constitutional rights. Accordingly, we affirm the District Court's grant of summary judgment to Mannell on all of Reedy's claims.

D. *Intentional Infliction of Emotional Distress*

Reedy brought a state law claim of intentional infliction of emotional distress against both Evanson and Meyer. The Court granted summary judgment, finding that neither Evanson's nor Meyer's conduct was "extreme and outrageous." (*Id.* at 43.)

While the Pennsylvania Supreme Court has yet to formally recognize a cause of action for intentional infliction of emotional distress, *see Taylor v. Albert Einstein Med. Ctr.*, 562 Pa. 176, 754 A.2d 650, 652 (Pa. 2000), the Pennsylvania Superior Court has recognized the cause of action and has held that, "in order for a plaintiff to prevail on such a claim, he or she must, at the least, demonstrate intentional outrageous or extreme conduct by the defendant, which causes severe emotional distress to the plaintiff." *Swisher v. Pitz*, 2005 PA Super 56, 868 A.2d 1228, 1230 (Pa. Super. Ct. 2005) (discussing how the Pennsylvania Supreme Court has indicated that, were it to recognize a cause of action for intentional infliction of emotional distress, these would be the requirements necessary for a plaintiff to prevail on such a claim). In addition, "a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct." *Id.* Liability on an intentional infliction of emotional distress claim "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Field v. Phila. Elec. Co.*, 388 Pa. Super. 400, 565 A.2d 1170, 1184 (Pa. Super. Ct. 1989).

Reedy argues that Evanson engaged in several "extreme and outrageous acts," and that the District Court erred because there was "ample evidence of Evanson['s] ... abusive treatment of her[.]" (Appellant's Opening Br. at 56.) Specifically, Reedy points to Evanson's denunciations of her, the fact that he traveled

to her home and harassed her, and his recklessly-made false statements and the omissions in his Affidavit. (*Id.* at 55-57.) While one may argue whether Evanson's conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious," *Field*, 565 A.2d at 1184, we need not decide the issue, because, to succeed on an intentional infliction of emotional distress claim, Reedy must show that she suffered "some type of resulting physical harm due to the defendant's outrageous conduct." *Swisher, 868 A.2d at 1230.* Reedy has not pointed to any physical harm she suffered as a result of police conduct and, for that reason alone, her intentional infliction of emotional distress claim fails as a matter of law. We thus affirm the District Court's grant of summary judgment on that claim.[46]

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46. Even though Reedy names both Evanson and Meyer in her emotional distress claim, the only allegations of extreme and outrageous acts in her briefing before us pertain to Evanson. It is thus fair to wonder whether she has abandoned her emotional distress claim against Meyer. Even if not abandoned, however, Reedy's emotional distress claim against Meyer fails for the same reasons that it fails against Evanson. She has not pointed to any physical harm suffered as a result of Meyer's actions. Accordingly, we affirm the District Court's grant of summary judgment to Meyer on Reedy's emotional distress claim.

We note also that Meyer was listed as a defendant in Count 5 of Reedy's complaint (harm to liberty interest in violation of the Due Process Clause of the Fourteenth Amendment). However, as discussed above, *see supra* note 17, that Count is subsumed by Reedy's Fourth Amendment counts, and Reedy did not name Meyer as a defendant in any of those counts.

IV. Conclusion

In conclusion, the District Court erred in granting summary judgment to Evanson on Reedy's Fourth Amendment unlawful seizure claim and her related federal and state law claims. Viewing the facts in the light most favorable to Reedy, no reasonably competent officer could have concluded at the time of Reedy's arrest that there was probable cause for the arrest. In addition, summary judgment on Evanson's defense of qualified immunity cannot stand. The availability of the defense must be decided after fact finding by the jury to determine whether the facts as recounted by Evanson or by Reedy are more credible. We thus vacate and remand for Counts 2, 3, and 4 of the complaint, as against Evanson, to go to a jury.

The District Court also erred in granting summary judgment to Evanson on Reedy's unlawful search claim. We reverse the Court's decision with respect to Count 1 of the complaint and remand for consideration of whether qualified immunity is available to Evanson on that Count.

Finally, we affirm the District Court's grant of summary judgment as to all claims against Meyer and Mannell, and as to Reedy's intentional infliction of emotional distress claim, Count 8, against Meyer and Evanson.

APPENDIX B — AUGUST 2, 2010 JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2210

SARA R. REEDY,

Appellant

v.

FRANK S. EVANSON, individually and in his official capacity as a Police Officer of the Township of Cranberry; STEVE MANNELL, individually and his official capacity as the Public Safety Director of the Township of Cranberry; KEVIN MEYER, individually and in his official capacity as a Police Officer of the Township of Cranberry;

Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 06-cv-01080)
District Judge: Honorable David Stewart Cercone

Argued
March 11, 2010

Appendix B

Before: BARRY, JORDAN and VAN ANTWERPEN,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on March 11, 2010. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the District Court's March 31, 2009 grant of summary judgment is VACATED in part, REVERSED in part, and AFFIRMED in part, all in accordance with the Opinion issued this date. The case is REMANDED for proceedings consistent with that Opinion. Costs to be taxed against appellees.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Date: August 2, 2010

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED APRIL 20, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2:06cv1080

SARA R. REEDY

Plaintiff,

v.

FRANK S. EVANSON, individually and in his official capacity as a Police Officer of the Township of Cranberry; STEVE MANNELL, individually and in his official capacity as the Public Safety Director of the Township of Cranberry; KEVIN MEYER, individually and in his official capacity as a Police Officer of the Township of Cranberry,

Defendants.

Judge David S. Cercone

OPINION

I. INTRODUCTION

Sarah R Reedy ("Plaintiff' or "Reedy") commenced this civil rights action pursuant to 42 U.S.C. § 1983 seeking redress for claims of unlawful search, unlawful

seizure, false imprisonment, and malicious prosecution under the Fourth Amendment and violation of liberty interests under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and false arrest, false imprisonment, abuse of process and intentional infliction of emotional distress under Pennsylvania Law. Detective Frank S. Evanson ("Detective Evanson"), Detective Kevin Meyer ("Detective Meyer"), and Public Safety Director Steve Mannell's (collectively "Defendants") filed a Motion for Summary Judgment. After careful consideration of the parties' submissions and the applicable law, this court issued an order granting defendants' motion on March 31, 2009. This opinion is issued in support of that order.

II. SUMMARY JUDGMENT STANDARDS

Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's claim, and upon which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. When the movant does not bear the burden of proof on the claim, the movant's initial burden may be met by

demonstrating the lack of record evidence to support the opponent's claim. *National State Bank v. National Reserve Bank*, 979 F.2d 1579, 1582 (3d Cir. 1992). Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a *genuine issue for trial*," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (*quoting* Fed.R.Civ.P. 56 (a), (e)) (emphasis in *Matsushita*). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In meeting its burden of proof, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party "must present affirmative evidence in order to defeat a properly supported motion" and cannot "simply reassert factually unsupported allegations." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989). Nor can the opponent "merely rely upon conclusory allegations in [its] pleadings or in memoranda and briefs." *Harter v. GAF Corp.*, 967 F.2d 846 (3d Cir. 1992). Likewise, mere conjecture or speculation by the party resisting summary judgment will not provide a basis upon which to deny the motion. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360,382-83 n.12 (3d Cir. 1990). If the non-moving party's evidence merely is colorable or lacks sufficient probative force summary judgment must be granted. *Anderson*, 477 U.S. at 249-50; see also *Big Apple BMW,*

Inc. v. BMW of North America, 974 F.2d 1358, 1362 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1262 (1993) (although the court is not permitted to weigh facts or competing inferences, it is no longer required to "turn a blind eye" to the weight of the evidence).

III. FACTUAL BACKGROUND

Unless otherwise specified, the following facts are undisputed. Defendant Evanson has been a police detective for the Cranberry Township Police Department since 1986. (Defendants' Concise Statement of Material Facts, doc. no. 99 at ¶ 1; Plaintiff's Responsive Concise Statement to Defendant's Concise Statement of Material Facts, doc. no. 104 at ¶ 1). On July 14, 2004, Detective Evanson was notified by Corporal Hartman of the Cranberry Township Police Department of a robbery and sexual assault at the J&G Gulf Station in which Plaintiff was the victim. (doc. no. 99 at ¶ 3). In January, 2005, Detective Evanson prepared and filed a Criminal Complaint and Affidavit of Probable Cause ("Affidavit") with District Justice Steffe for the purpose of charging Plaintiff with the misdemeanor crimes of theft, receiving stolen property, and making false reports to law enforcement authorities. (doc. no. 99 at ¶ 7; doc. no. 104 at ¶ 7). District Justice Steffe issued a warrant for Plaintiff's arrest. (doc. no. 99 at ¶ 7). What follows is a chronological account of the events from the robbery and sexual assault up to the point the charges against Plaintiff were dropped.[1]

1. This account will also include the contents of Detective Evanson's Affidavit of Probable Cause (doc. 98, exh. 3) as Defendants' Concise Statement of Material Facts details all forty-seven (47) sentences of the Affidavit (*See* doc. 99 at ¶¶ 9-55).

Appendix C

A. The Incident

Immediately following the robbery and assault, Plaintiff made her way to Jordan's Service Center and informed the employee on duty, Robert McGee, that she had been robbed. (doc. 99 at ¶ 10; doc. 104 at ¶ 10). McGee placed a 911 call to report the incident, and while on the phone, Plaintiff stated that she had also been sexually assaulted. (doc. 99 at ¶ 12; doc. no. 104 at ¶ 12). The actor was described as a male, approximately 5'6" to 5'7" tall, wearing a blue baseball cap, blue jeans, and blue boxers. (doc. no. 99 at ¶ 13; doc. no. 104 at ¶ 13). Plaintiff did not know which direction the actor left the scene or have any vehicle description. (doc. no. 99 at ¶ 14; doc. 104 at ¶ 14). Plaintiff's boyfriend, Mark Watt, arrived on the scene after being called by Plaintiff, and Corporal Charles M. Mascellino transported both Plaintiff and Mark Watt to the University of Pittsburgh Medical Center ("UPMC") Cranberry. (doc. 99 at ¶ 14; doc. no. 104 ¶ 14). While at the hospital, Plaintiff reported the details of the robbery and sexual assault to Corporal Mascellino, who then entered into the Police Report a detailed recitation of Plaintiff's description:

> At the ER, RO [Mascellino] and Reedy were seated in the triage area while awaiting Det. Evanson. RO asked Reedy about the incident and to say what happened. Reedy stated that she was reading the newspaper when a male walked in. She stated that she didn't pay much attention to him. She stated that he went and picked up a pack of gum, then went over to

the register. Reedy then stated that he pulled a black gun from the front of his waistband and ordered her to get on the floor. The male then walked around the counter and asked her how to open the register. She told him to push the No Sale key. Male couldn't find the key, and she told him she thought it was blue and had a "NS" on it. The male then opened the register and took the money out of the register. RO asked if she knew how much was in the register. Reedy stated that there was $75.00 in *$5's*, about $80.00 in $10's, some $20's, and she was unsure how many $1's. Reedy said the male then unzipped his pants and took out his "dick." She stated that he told her to "suck his cock" and that she didn't want to die so she did. He then told her to stick her finger up his "asshole" and she did. The male told her he was going to come, and that she would swallow it or he would shoot her in the head. She stated again that she did not want to die so she did. She also stated that he was playing with her breasts. When RO asked where this happened, Reedy stated that it was in front of the windows so everyone could see. Reedy stated that the male told her to go into the back room, which she did. The male told her to open the safe, which she did. He then told her to take out the money. She stated that she took two envelopes out of the safe. One envelope contained $75.00 in $1.00 bills. The other envelope was a blue envelope

> marked lottery, and she was not sure how much was in it. She said the male then told her to rip the phone lines from the wall and she did. He then told her to stay there for 5 minutes or he would shoot her. She stated that she waited there for a while, then ran out the back door over to Jordan's.

(doc. no. 104 at ¶¶ 61-63; Defendants' Response to Plaintiff's Additional Material Facts, doc. no. 107 at ¶¶ 61-63).[2]

Upon Detective Evanson's arrival at UPMC Cranberry, he and Corporal Mascellino entered the room where Plaintiff was being treated and she again advised the officers of the incident. (doc. no. 99 at ¶¶ 16-26; doc. no. 104 at ¶¶ 16-26).[3] She further advised the officers that the incident occurred at approximately 10:40 P.M. (doc. no. 99 at ¶ 28; doc. no. 104 at ¶ 28). Prior to being released from UPMC Cranberry, Plaintiff agreed to provide Detective Evanson with a written statement. (doc. no. 99 at ¶ 29; doc. no. 104 at ¶ 29).

Nurse Mary Beth Farah treated Plaintiff on the night of the incident, and provided a written statement

2. Corporal Mascellino's report appears in other parts of the record.

3. Plaintiff's description of the actor's age is in dispute. In the Affidavit of Probable Cause, the actor is described as between 28 and 31 years of age. Plaintiff contends she advised the officers that the male was from his mid-30's to early 40's. (doc. no. 99 at ¶ 18; doc. no. 104 at ¶ 19).

to Detective Evanson which included information that Plaintiff conveyed about the incident. (doc. 104 at ¶¶ 80-81; doc. no. 107 at ¶¶ 80-81). Nurse Farah's narrative quoted Plaintiff as saying "[t]hey're calling me a liar." (doc. no. 104 at ¶ 82; doc. no. 107 at ¶ 82). The narrative also included another detailed account from Plaintiff describing the incident. (doc. no. 104 at ¶ 83).[4]

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4. Nurse Farah's Narrative includes the following:

> Pt reports while working as a cashier at Gulf Station unk man 5'6 - 5'7" caucasian approx 150 lbs with brown hair, baseball cap wearing blue jeans grey T shirt and brown work boots age mid 30's-40's entered store held handgun to left side of her head and made her take money out of cash register then told her to remove her shit and stated "suck my dick and if you bite me I'll hurt you." Assailant then had oral intercourse while next to cash register ejaculating in pt's mouth and instructed her to swallow it which she did. Pt reports no semen got on her face & Pt states she was then told to go into the back office and rip phone cords out. Pit states he then fondled her breasts using hands. No licking scratching or biting done no marks noted on chest. He then instructed pt to insert her finger into his rectum pt states she used her left index finger. He then told her not to move for 5 minutes. During this five minutes she states she gargled with water twice and washed her hands with soap and water. Pt states she then went across the street to Denny Jordans to call for help pt presents wearing same clothing at time of assault - shirt & pants collected pt not wearing a bra.

(doc. no. 104 at ¶ 83).

Appendix C

B. The Panic Alarm and the "No Sale" Key

J&G Gulf manager Carol Hazlett was at the store on July 14, 2004 for a period of time, but went home prior to the incident. (doc. no. 99 at ¶¶ 31-32; doc. no. 104 ¶¶ 31-32). At approximately 11:20 P.M., the station's alarm company, Security Systems of America, contacted i Ms. Hazlett to report an interruption to the power source of the alarm and that it failed to restore after a one-hour delay. (doc. no. 99 at ¶ 33; doc. no. 104 at ¶ 33). The alarm company contacted Ms. Hazlett after it attempted to call the J&G Gulf Station and received no answer. (doc. no. 99 at ¶ 34; doc. no. 104 at ¶ 34). Upon arriving at the station, Ms. Hazlett checked the power cord for the alarm, located behind the desk in the rear office, and discovered that it had been unplugged. (doc. no. 99 at ¶ 36; doc. no. 104 at ¶ 36). Plaintiff denies pulling the plug or even knowing where it was located prior to the incident. (Reedy Depo. at 113-14). No other explanation as to how the alarm plug was pulled has been proffered by either party. *(Id.;* Evanson Depo. at 215-16).

Ms. Hazlett also pulled the register take for the night of July 14, 2004 and found that the NS ("No Sale") key had been pushed at 9:40 P.M. (doc. no. 99 at ¶ 37; doc. no. 104 at ¶ 37). The register's time was one hour behind actual time, meaning that the NS key was pushed at 10:40 P.M. *(Id.)*. Ms. Hazlett confirmed that the clock in the station is not in sync with the register clock. (doc. no. 99 at ¶ 38; doc. no. 104 at ¶ 38).

Appendix C

C. Plaintiff's Meeting with Detective Evanson

At some point following the incident, Plaintiff, accompanied by her parents, met with Detective Evanson at the Cranberry Township Police Station to discuss the incident and provide a written statement.[5] At this meeting, Detective Evanson asked Plaintiff about the alarm plug, and she stated that while in the rear office with the actor, she only disabled the telephone and she did not believe the actor disabled any lines for electricity or the alarm. (doc. no. 99 at ¶¶ 41-43; doc. no. 104 at ¶¶ 41-43). Detective Evanson advised Plaintiff that a report from Security Systems of America continued that an alarm was signaled at 2314 hours because of a power failure at 2214 hours. (doc. no. 98, exh. F; doc. no. 99 at ¶ 44). He then questioned Plaintiff as to how this power failure could have occurred at 2214 hours when the incident occurred at 2240 hours. (doc. no. 99 at¶¶ 47).

In response to this line of questioning, Plaintiff became upset and said she wanted to "drop the whole thing" *(Id.)*. In the Affidavit, Detective Evanson characterized Plaintiff as being "verbally abusive," but

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5. Detective Evanson wrote in the Affidavit of Probable Cause that Plaintiff came to the police station on July 23, 2004. (doc. no. 99 at ¶ 40). Plaintiff states that she, her mother, and her step-father met with Detective Evanson on July 16, 2004, the day after her release from UPMC Cranberry. (doc. no. 104 at ¶ 40). Regardless, at some point shortly after her release from the hospital, Plaintiff met with Detective Evanson to discuss the incident and provide a written statement.

Plaintiff claims she was only upset because Detective Evanson grew "hostile" towards her and accused her of lying and taking money from the Gulf Station. *(Id.* at ¶ 47; doc. no. 104 at ¶ 47, ex. 6, Reedy Depo., at 88:11-20, 93:12-94:19,111:8-25). Detective Evanson informed Plaintiff that the matter could not be dropped due to the alleged robbery and theft, at which time Plaintiff grew more agitated and stated she just wanted "the whole thing to go away." (doc. no. 99 at ¶ 48). Plaintiff claims that she grew more agitated and indicated a desire to stop the proceedings in response to Detective Evanson's hostility and badgering. (doc. no. 104 at ¶ 48).

D. Plaintiff and Mark Watt's Mobile Home Rental

According to David Kriley, manager of Green Acres Trailer Park located on Route 8 in Penn Township, Plaintiff and Mark Watt inquired about renting a trailer sometime in mid-July. (doc. no. 99 at ¶ 50; doc. no. 104 at ¶ 50). On July 19, 2004, Plaintiff and Mark Watt applied to rent a mobile home, agreeing to a monthly rental fee of $365.00 and to pay a security deposit in the amount of one month's rent prior to moving in. (doc. no. 99 at ¶¶ 51-52; doc. no. 104 at ¶¶ 51-52). It was noted on the application that Catholic Charities agreed to provide $200.00 of the initial security deposit and Plaintiff and Mark Watt agreed to provide the remaining $165.00, which they did, in cash, on July 20, 2004. (doc. no. 99 at ¶¶ 53-54; doc. no. 104 at ¶¶ 53-54). Mark Watt supplied the additional $165.00 in cash.

Appendix C

E. Plaintiff's Arrest and Subsequent Release

On January 10, 2005, Detective Evanson prepared a draft affidavit of probable cause that he later submitted to District Attorney William T. Fullerton, Esquire. (doc. no. 104, exh. 14). Mr. Fullerton emailed Detective Evanson, advising that the affidavit should be trimmed. (doc. no. 112, exh. 28). Detective Evanson made the requested modifications and submitted the final Affidavit of Probable Cause to District Justice Steffe. Upon consideration of the Affidavit of Probable Cause, District Justice Steffe issued a warrant for Plaintiff's arrest for the charges set forth in the criminal complaint. (doc. no. 99 at ¶ 56).

On January 18, 2005, Plaintiff learned that the arrest warrant had been issued for her arrest and turned herself in at the Magisterial District Judge's office the following day. (Plaintiff's Pretrial Statement, doc. no. 89 at 5). A cash bond was set in the amount of $5,000.00. Plaintiff was unable to post bond, taken into custody and transported to the Butler County Jail where she spent five (5) days. *(Id.* at 6). Plaintiff posted bail on the sixth day and was released, and her trial was scheduled for September 19, 2005. *(Id.* at 7). In August, 2005, police in Brookville, Pennsylvania, apprehended Wilbur Brown for committing a similar crime whereupon he confessed to the robbery and sexual assault of Plaintiff. (doc. no. 99 at ¶ 57). All charges were withdrawn by the District Attorney's office without opposition by Detective Evanson. (*Id.* at ¶ 58).

F. The "Landmark Attack"

At least one other rape was reported in Cranberry Township in 2004, and this occurred near the Landmark Building. (doc. no. 104 at ¶¶ 136-37; doc. no. 107 at ¶¶ 136-37). Detective Evanson was the lead investigator on this matter. (doc. no. 104 at ¶ 138; doc. no. 107 at ¶ 138). Plaintiff's situation and the Landmark Attack share a number of similarities, namely proximity in location and time as well as the style of the attack. Both attacks occurred roughly 1.5 miles and 91 days apart. (doc. no. 104 at ¶¶ 142-43). Both the Landmark Attack victim and Plaintiff were robbed of money and forced to perform oral sex on the assailant after having a black, semi-automatic handgun pointed at their head. (doc. no. 104 at ¶¶ 152-55; doc no. 107 at ¶¶ 152-55).

G. Public Safety Director Mannell and Detective Meyer's Role

As Director of Public Safety, Steve Mannell was the head of the Cranberry Township Police Department and was responsible for the day-to-day supervision of the Department. (doc. no. 104 at ¶¶ 170-71). For a case that warranted investigation, Mannell would review the incident report and take it to the Detectives and advise them that they needed to look into the matter further. *(Id.* at ¶ 176). In the investigation of rapes or robberies, Mannell was kept abreast of what was occurring in the investigation. *(Id.* at ¶ 178). In investigations deemed "important," Mannell would be kept abreast when a decision was made to take charges to the District

Attorney and also kept apprised of the matter after the charges were filed. *(Id.* at ¶¶ 179-80). Throughout the investigation of Plaintiff's case, Detective Evanson kept Mannell up to date regarding Evanson's efforts on the case. *(Id.* at ¶ 183). Mannell approved the Detectives' handling of Plaintiff's case. *(Id.* at ¶ 187). He was also aware of the reason the decision was made to charge Plaintiff with theft and a false police report as he has stated "[i]f she had cooperated, had provided the information that we requested, made herself available for interviews, this wouldn't have happened." *(Id.* at ¶ 191; Mannell Depo. at 95:4-96:5, 160:3-6).

Detective Meyer assisted Detective Evanson at several points during the investigation, namely at the hospital and when Detective Evanson went to Plaintiff's mobile home to question her.

Defendants raise the defense of qualified immunity to all of Plaintiff's § 1983 claims and assert that the existence of probable cause defeats the remaining additional state law claims. They acted pursuant to a warrant for Plaintiff's arrest which assertedly was supported by the Affidavit. Plaintiff contends that Defendant Evanson made several material misstatements in and omissions from the Affidavit, and a corrected affidavit would not support probable cause for the crimes of filing a false police report, theft of property, and receiving stolen property.

IV. DISCUSSION

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory in the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Thus, to establish a claim under § 1983, a plaintiff must establish the following elements: (1) the defendant acted under color of state law; (2) the defendant violated a federal constitutional or statutory right; and (3) the violation caused injury to the plaintiff. *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005).

In § 1983 cases, the question of probable cause is generally one for the jury. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 789 (3d Cir. 2000). It is particularly a jury issue where probable cause rests on a credibility determination. *Id.* A district court, however, may conclude "that probable cause exists as a matter of law if the evidence, viewed most favorably to plaintiff, reasonably would not support a contrary factual finding." *Id.* (quoting *Sherwood v. Mulvihill*, 113 F.3d

396, 401 (3d Cir. 1997)). It is the responsibility of the court to determine the objective facts available to the officer at the time of the arrest and determine if they were sufficient to justify a reasonable belief that the plaintiff violated the law. *See Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997).

The issue of probable cause will be examined by discussing Detective Evanson's alleged falsehoods in and omissions from the Affidavit in order to determine whether it has to be corrected. If so, the corrected Affidavit will be examined to determine whether it still establishes probable cause.

A. Probable Cause

Plaintiff's Fourth and Fourteenth Amendment claims hinge on whether Defendants had probable cause to charge Plaintiff with the crimes in the warrant. The Fourth Amendment of the United States Constitution provides that people are "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, ... and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

Articulating an exact definition for probable cause is difficult. In general, probable cause exists when the facts and circumstances within the arresting officer's knowledge give rise to a "fair probability" that the suspect has committed or is committing a crime. *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000). It is a commonsense concept that deals with "the factual and

practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). As such, the probable cause standards is "not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 695-96 (quoting *Gates*, 492 U.S. at 232). It is not a "finely-tuned" standard, comparable to the standards of proof beyond a reasonable doubt or proof by a preponderance of the evidence. *Id.* And it as a fluid concept that take its substantive content from the particular context in which the standard is being assessed. *Id.* at 696 (citing *Gates*, 462 U.S. at 232; *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949) ("The standard of proof [for probable cause] is ... correlative to what must be proved").

While "the probable cause standard is incapable of precise definition or quantification," *Maryland v. Pringle*, 540 U.S. 366, 371, all determinations must be based on specific facts and circumstance that would warrant a prudent individual to believe there is a fair probability that an offense has been or is being committed. *See Wright v. City of Philadelphia*, 409 F.3d 595, 601-602 (3d Cir. 2005) (citing *Hill v. California*, 401 U.S. 797, 804 (1971) ("Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment .... ")); *Gates*, 462 U.S. at 246 ("probable cause does not demand the certainty we associate with formal trials."). And while it requires more than "mere suspicion," *Orsatti*, 71 F.3d at 482-83, it does not "require the same type of evidence of each element of the offense

as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). Thus, the evidentiary standard for probable cause is "significantly lower than the standard which is required for conviction." *Wright*, 409 F.3d at 602 (citing *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979)).

Probable cause determinations require an analysis of the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 233 (1983). A determination of reasonableness under the Fourth Amendment may be based on factors which by themselves are susceptible of innocent explanation. *See U.S. v. Sokolow*, 490 U.S. 1, 10 (1989) ("We noted in *Gates*, 462 U.S. at 243-244, n. 13 ... that 'innocent behavior will frequently provide the basis for a showing of probable cause,' and that '[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.'"); *Draper v. United States*, 358 U.S. 307 (1959) (upholding probable cause arrest based upon tip from informant containing several innocuous corroborative elements that subsequently were witnessed by arresting officers); *Cf. United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding that a determination of reasonable suspicion may be based entirely on factors which by themselves are susceptible of innocent explanation.). And such determinations "need not rule a out a possibility of innocent conduct." *Arvizu*, 534 U.S. at 277 (citing in support *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

Appendix C

The principal components of the determination consist of the events which led up to the arrest, and then a decision must be made whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amounted to probable cause. *Ornelas*, 517 U.S. at 696. "The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Id.* at 696-97 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19 (1982)).

Furthermore, the crime with which a suspect is eventually charged does not control the probable cause analysis. *Id.* Instead, "[p]robable cause need only exist as to any offense that could be charged under the circumstances." *Id.* (quoting *Barna v. City of Perth Amboy*, 42 F.3d 809,819 (3d Cir. 1994)).

In undertaking a probable cause determination, a district court must examine the elements of the crime or crimes at issue. *Wright*, 409 F.3d at 602. Plaintiff was charged with theft by unlawful taking, receiving stolen property, and filing a false police report. These defenses are defined as set forth below.

Appendix C

18 Pa. C.S. § 4906(b)(1) provides:

> (b) FICTITIOUS REPORTS. — Except as provided in subsection (c), a person commits a misdemeanor in the third degree if he:
>
> > (1) reports to law enforcement authorities an offense or other incident within their concern knowing it did not occur . . . .

18 Pa. C.S. § 4906(b)(1). Theft by unlawful taking appears at 18 Pa C.S. § 3921, which provides:

> § 3921. Theft by unlawful taking or disposition
>
> (a) MOVABLE PROPERTY. — A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.

18 Pa. C.S. § 3921(a). Receiving stolen property appears at 18 Pa. C.S. § 3294 and provides:

> § 3924. Theft of property lost, mislaid, or delivered by mistake
>
> A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the

> identity of the recipient is guilty of theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

18 Pa. C.S. § 3924.

Plaintiff's primary contentions are that Detective Evanson made material false statements in and omissions from the final draft of the Affidavit and that, if those misstatements and omissions are excluded and included, they would have negated probable cause. *(See* doc. no. 103 at 10-26). Defendants maintain that the Affidavit contained ample facts and circumstances permitting District Justice Steffe to make a finding of probable cause.

An arrest warrant issued by a magistrate or judge "does not, in itself, shelter an officer from liability for false arrest." *Wilson*, 212 F.3d at 786 (citing *Sherwood*, 113 F.3d at 399). A plaintiff may succeed in a § 1983 action for false arrest made pursuant to a warrant if the plaintiff shows, by a preponderance of the evidence: (1) that the police officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;" and (2) that "such statements or omissions are material, or necessary, to the finding of probable cause." *Id.* at 786-87 (quoting *Sherwood*, 113 F.3d at 399).

As to what constitutes a "reckless disregard for the truth," a showing that the officer acted with negligence

or innocent mistake is insufficient. *Wilson*, 212 F.3d at 787 (citing *United States v. Davis*, 617 F.3d 677, 694 (D.C. Cir. 1979)). Acting with a reckless disregard for the truth has different meanings in dealing with omissions and assertions. *Wilson*, 212 F.3d at 787. Recognizing that "all storytelling involves an element of selectivity," the United States Court of Appeals for the Third Circuit has held that "omissions are made with a reckless disregard if an officer withholds a fact in his ken that 'any reasonable person would have known that was the kind of thing that a judge would wish to know.'" *Id.* at 787-88 (quoting *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993)). Assertions, on the other hand, can be made with reckless disregard for the truth "even if they involve minor details — recklessness [in this arena] is measured not by the relevance of the information, but the demonstration of willingness to distort the truth." *Wilson*, 212 F.3d at 788. "[A]n assertion is made with reckless disregard when 'viewing all the evidence, the affiant must have entertained serious doubt as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported'" *Id.* (quoting *United States v. Clapp*, 46 F.3d 795, 801 n.6 (8th Cir. 1995)).

The false statements and omissions advanced by Plaintiff will be examined under the above standards to determine whether the Affidavit should be amended on the ground that Detective Evanson could be found to have acted with reckless disregard for the truth.

Appendix C

1. The Alleged False Statements and Omissions Regarding Detective Evanson's Meeting with Reedy

a. Plaintiff's agreement to meet with the police and provide them with a written statement on July 15, 2004

Sentence 21 of the Affidavit states that "[p]rior to being released from UPMC victim agreed to provide Affiant with a written statement on 07-15-04." Plaintiff contends that she did not agree to provide a written statement on July 15, 2004 and, therefore, this is a false statement. (doc. no. 103 at 12). Sentence 23 of the Affidavit states that "[o]ver the next several days Affiant continued to attempt to make contact with Sarah Reedy with negative results." Plaintiff contends that this is a false statement because she and her mother spoke with Detective Evanson on July 16, 2004 at the police station and Plaintiff provided a handwritten statement (doc. no. 103 at 13). Sentence 32 of the Affidavit states that "[o]n July 23, 2004 Affiant met with Sarah Reedy and her mother at Cranberry Twp. Police Station .... " Plaintiff contends that this is a false statement because, once again, she and her mother met with Detective Evanson on July 16, 2004. *(Id.)*.

Plaintiff testified in her deposition that when asked by Detective Evanson to come in the next day, she told him: "I don't know if I can come in tomorrow and do this for you. It's already 3 o'clock in the morning. I got to get up early and go to school." (Reedy Depo. at 98:10-

20). When asked about the July 23 date, Plaintiff answered:

> I believe that [the] robbery happened on a Wednesday. I know I went down that Friday I dropped off my uniforms and tried to pick up my paycheck, and I got the cops called on me for trying to drop off my uniforms and return them.
>
> And then I went to the police station to make a written statement because my mother said the only way she would go ahead and cash my paycheck is if I went to the police station and made a written statement, because she had been talking to Detective Evanson on the phone. So I believe it was the 16th when I went down.

(Reedy Depo. at 101:10-23). Plaintiff's mother, Debbie Bosco, also testified that she recalled going into the police station on Friday, July 16, 2004. When asked whether she went to the police station the same week as the incident or the following week, Ms. Bosco stated: "It was the same week. It was only the day after, two days after. Wednesday it happened. Thursday I talked to Detective Evanson. Friday we were in the police station." (Debbie Bosco Depo. at 29:4-7). Plaintiff's mother testified that upon reading the Affidavit, she told her daughter that "[t]hese [dates] aren't right." *(Id.* at 30:10).

Given the testimony of Plaintiff and her mother, a jury, after drawing all inferences in a light most favorable to Plaintiff, could conclude that Detective Evanson had "obvious reasons to doubt the accuracy of the information he reported." *Wilson*, 212 F.3d at 788. Therefore, a jury could conclude that Detective Evanson acted with reckless disregard for the truth regarding the date of his meeting with Plaintiff and her family. The corrected affidavit must reflect the date of the meeting as July 16, 2004.

Sentence 22 of the Affidavit states that Detective Evanson unsuccessfully attempted to contact Plaintiff on July 15, 2004. (doc. no. 103 at 13). Plaintiff believes that Detective Evanson omitted that he spoke to her mother on July 15, 2004 and she arranged for her daughter to go to the police station on July 16, 2004. *(Id.)*. Debbie Bosco testified that she placed a call to Detective Evanson on Thursday, July 15, 2004, the day after the incident, to discuss the situation. *(See* Debbie Bosco Depo. at 28:11-30:10). Detective Evanson omitted this information with reckless disregard for the truth if "any reasonable person would have known [this fact] was something that the judge would wish to know." *Wilson*, 212 F.3d at 787. Drawing all inferences in favor of Plaintiff, a jury could conclude that a judge would wish to know that Detective Evanson at least spoke with Plaintiff's mother during his attempts to contact Plaintiff. The corrected Affidavit must reflect that Detective Evanson spoke with Plaintiff's mother the day after the incident.

b. Statement regarding the purpose of the meeting

Sentence 32 of the Affidavit states that the purpose of the meeting at the police station was "[t]o discuss the alleged Assault and Robbery that occurred on 07-14-04." Plaintiff contends that this is a false statement because the true purpose of the meeting was to have her "confess to the crime." (doc. no. 103 at 13). Plaintiff's step-father, Paul Bosco, testified that while Plaintiff was writing her statement at the police station, Detective Evanson approached him and Debbie Bosco and told them he knew that Plaintiff and her boyfriend, Mark Watt, were responsible for the robbery. (doc. no. 103 at 14; doc. 104 at ¶ 112; Paul Bosco Depo. at 15:13-16). Further, Detective Evanson informed Plaintiff's parents that it was only going to be "a matter of time ... before he tied up the loose ends and put it all together so it would be in her best interests if [they] would encourage her to ... admit it." (doc. no. 103 at ¶¶ 113-115; Paul Bosco Depo. at 15:17-20). According to Paul Bosco, Detective Evanson had Plaintiff and her parents believe that if she confessed that the incident was Mark Watt's idea, the police would send her home and nothing serious would happen to her. (doc. no. 103 at 14; Paul Bosco Depo. at 18:2-8). Further, Paul Bosco stated that Detective Evanson said he wanted to "burn" Mark Watt and he was going to do it. (Paul Bosco Depo. at 41:11-19). Detective Evanson denies making these statements. *(See* doc. no. 107 at ¶¶ 112-115). Finally, Plaintiff testified that while at the meeting, she was "insulted" because Detective Evanson requested that she be hooked up to a polygraph. (Reedy Depo. at 111:23-25).

Drawing all inferences in Plaintiff's favor, a jury could conclude that, because he stated to Plaintiff's parents that he wished to elicit a confession from Plaintiff, Detective Evanson had "obvious reasons to doubt the accuracy" of Sentence 32. *Wilson*, 212 F.3d at 787. While Detective Evanson did ask Plaintiff to come to the police station to discuss the incident, an accurate statement would be that he also wanted to discuss the possibility that she fabricated the incident to cover for her boyfriend. The corrected affidavit must reflect this change.

c. Statment that Plaintiff Verbally Abused Detective Evanson

Plaintiff argues that Detective Evanson falsely characterized her reaction to his questioning by indicating she became "verbally abusive." (doc. no. 103 at 14). Paul Bosco testified that he would have called her reaction "upset." (Paul Bosco Depo. 33:24-25). Drawing all inferences in Plaintiff's favor, it is reasonable to conclude that she became upset at Detective Evanson's line of questioning rather than "verbally abusive." The corrected affidavit must reflect this change.

2. Omissions of the Details of the Sexual Assault

Plaintiff avers that Detective Evanson omitted every detail Plaintiff provided regarding the sexual assault and the fact that she reported the assault in graphic

detail to a number of officers and a nurse while at the hospital on the night of the incident. (doc. no. 103 at 15-18). As stated above, Plaintiff provided a detailed description of the incident to Corporal Mascellino, which he entered into the Police Report. (doc. no. 104 at ¶ 163). Detective Evanson included this description in the Draft Affidavit, but deleted it before he filed the Affidavit with the District Justice. (doc. no. 103 at 16; doc. no. 104 at ¶¶ 64-66).

Sentences 14 and 15 of the Affidavit state, "[s]uspect opened register and removed cash from same. Suspect then ordered victim to disable phone lines located in rear office area." Plaintiff points to Detective Evanson's entry into the Police Report to show that he omitted the details of the assault that took place between the time the assailant took money from the register and the time he ordered Plaintiff to disable the phone lines in the rear office. (doc. no. 103 at 16). Detective Evanson made the following entry into the police report:

> [S]uspect ordered victim to take off her shirt which she did while he faced her looking out the windows and unzipped his pants exposing his penis. Suspect then stated "Suck my dick and don't bite it or I'll shoot you." Victim performed oral sex on suspect as he fondled her breasts and prior to him ejaculating suspect told victim to swallow it or he would hurt her so victim complied. Suspect then ordered victim into back office area where he again ordered her to sit on the floor. Suspect

> viewed that the safe door was partially opened and then ask [sic] victim if there was any money in the safe. Victim responded "yes" and then removed the money from the safe and handed it to the suspect.

(doc. no. 103 at 16-17; doc. no. 104 at ¶ 67, exh. 1, Police Report, at 4). Furthermore, while at the hospital Plaintiff informed the officers that she did not need a representative from the victim support service VOICE because she had been sexually abused by her grandfather and knew how to handle the situation. Detective Evanson made the following entry in the police report:

> Victim used graphic profanity to describe sexual acts that she was forced to perform on suspect. Officers offered victim the services of a VOICE representative on several occasions which she refused and stated that she had been sexually abused as a child by her grandfather and was familiar with how to deal with the situation.

(doc. no. 103 at 17; doc. no. 104 at ¶ 205, exh. 1, Police Report, at 5). Detective Evanson included both entries from the Police Report in the Draft Affidavit but excluded them from the final Affidavit. (doc. no. 103 at 17).

Further, Plaintiff notes that Detective Evanson omitted all the details from Nurse Farah's narrative,

which Detective Evanson obtained prior to leaving the hospital. (doc. no. 103 at 18). This narrative noted that Plaintiff received treatment and an examination from Nurse Farah. *(Id.;* doc. no. 104 at ¶ 207, exh. 16). Nurse Farah's Narrative also quoted Plaintiff as saying "[t]hey're calling me a liar." (doc. no. 104 at ¶ 82, exh. 16). The Narrative included a graphic description of the attack similar to the one Plaintiff gave to Corporal Mascellino. (doc. no. 103 at 18; doc. no. 104 at ¶¶ 84-86, exh. 16).

Keeping in mind that "all storytelling involves selectivity," the Affidavit need not include all of the graphic details of the sexual assault. *See Wilson,* 212 F.3d at 787. However, drawing all inferences in a light most favorable to Plaintiff, a jury could conclude that a magistrate would want to know that Plaintiff provided two separate accounts of the assault in graphic detail to Corporal Mascellino and Nurse Farah and that these accounts were consistent. A magistrate would also like to know that Plaintiff was treated for the assault and submitted to a rape examination. These omissions must be included in the corrected affidavit.

3. Facts Relating to the Store's Panic Alarm Button

Sentence 36 of the Affidavit states that "Affiant at the time advised Miss Reedy that Affiant had received confirmation from Security Systems of America that due to a power failure that occurred at 2214 hours an alarm was signaled at 2314 hours." This means that the power

supply to the alarm was cut off at 10:14 P.M., twenty-six (26) minutes prior to the incident. (doc. no. 104 at ¶ 28). Plaintiff contends that this is only relevant to a probable cause determination if she would have tried to use the panic alarm and it was inoperable. (doc. no. 103 at 20). She further notes that Detective Evanson omitted the fact that he believed Plaintiff's failure to press the panic button might have been due to the fact that the assailant held a gun to her head and she was too distraught to reach for it. (doc. no. 104 at ¶ 125). Detective Evanson testified to as much in his deposition. (Evanson Depo. at 180:22-181:2).

Plaintiff argues that Detective Evanson further omitted details surrounding the investigation of the panic alarm on the night of the incident. (doc. no. 103 at 20). Officer Kobistek did a "practice demonstration" to see if the panic alarm worked, and the 911 department reported a panic alarm at 1:40 A.M. on July 15, 2004. (doc. no. 104 at ¶ 128; Evanson Depo. at 437:13-19). Therefore, had Plaintiff attempted to hit the alarm during the incident, it would have worked. (doc. no. 104 at ¶ 130).

Given the fact that the Affidavit devoted nine sentences to the alarm system and its power supply, a jury could conclude that a magistrate would like to know some additional details about the panic alarm, including the fact that it would have worked had Plaintiff attempted to use it and that Plaintiff may have been too distraught to make such an attempt due to a gun being pointed at her head at the time. There is some

dispute as to whether Detective Evanson was aware of the investigation of the panic alarm at the time he filed the Affidavit. (Defendants' Reply, doc. no. 109 at 14). However, drawing all inferences in a light most favorable to Plaintiff, it must be assumed that he was. Therefore, this information must be included in the corrected affidavit.

4. Plaintiff's Description of the Attacker and Carol Hazlett's Presence at and Departure from the J&G Gulf Station

Sentence 18 of the Affidavit states that Plaintiff advised the officers that the assailant was "between 28 and 31 years of age." Plaintiff testified that her "words were from his mid-30's to early 40's." (Reedy Depo. at 61:15-16). She also told Nurse Farah the same, and the description appears in Nurse Farah's Narrative. (doc. no. 104, exh. 16). Given these descriptions of record, Detective Evanson had "obvious reasons to doubt the accuracy" of this particular statement. *Wilson*, 212 F.3d at 787. Plaintiff's description of the assailant's age must be included in the corrected affidavit.

Sentence 25 of the Affidavit states that, on the day of the incident, "Ms. Hazlett stated that at approx. 2115 hrs. she proceeded home ...." However, Ms. Hazlett testified that she proceeded home at approximately 3:00 p.m. once Plaintiff arrived for her shift. (Hazlett Depo. at 41:7-8). She did not return to the store until after she received the phone call from the alarm company at approximately 11:20 p.m. (Hazlett Depo. at 41:14-17).

Although a minor detail, Ms. Hazlett's testimony gives Detective Evanson an "obvious reason[] to doubt the accuracy" of Sentence 25. Ms. Hazlett's correct departure time will be included in the corrected affidavit.

5. Omissions Regarding the "Landmark Attack"

Plaintiff contends that Detective Evanson should have included details in the Affidavit about the "Landmark Attack" because he was the lead investigator on that case as well. (doc. no. 103 at 21-22). Both attacks involved a robbery and sexual assault at gunpoint of Caucasian females by similarly described assailants. *(Id.* at 22). Both attacks also occurred in close proximity to one another in both location (1.5 miles) and time (91 days). *(Id.)*. The graphic details of the assault are also similar. *(Id.)*. Plaintiff also offers the testimony of Corporal George Cronin of the Pennsylvania State Police, who is prepared to opine that the similarities between the attacks are both relevant and "fairly obvious," and that he would expect a detective who was investigating both of these cases to recognize the similarities. (doc. no. 104 at ¶ 202; Cronin Depo. at 5:8-16, 64:25-65:13, 66:6-77:18, 96:17-98:5).

A reasonable person would conclude that a magistrate does not need to know every single detail regarding Plaintiff's attack as compared to the "Landmark Attack" in order to be apprised that the two share general similarities. Such details neither add to nor subtract from the probable cause determination.

However, drawing all inferences in a light most favorable to Plaintiff, a jury could conclude that a magistrate would want to know that in October of 2004 Detective Evanson investigated a robbery and sexual assault with several similarities to Plaintiffs described attack. This additional information must be included in the corrected affidavit.

6. Materiality

Because there is sufficient evidence of omissions and assertions made knowingly, or with reckless disregard for the truth, the next step is to assess whether these false statements or omissions were "material, or necessary, to the finding of probable cause." *Wilson*, 212 F.3d at 789 (quoting *Sherwood*, 113 F.3d at 399) (internal quotations omitted). "To determine the materiality of the misstatements and omissions, we excise the offending inaccuracies and insert the facts recklessly omitted and determine whether or not the 'corrected' warrant affidavit would establish probable cause." *Wilson*, 212 F.3d at 789 (citing *Sherwood*, 113 F.3d at 400). If it does, then Summary Judgment must be granted to Detective Evanson because he had probable cause to arrest Plaintiff even if there had been no omissions or inaccuracies. *See Wilson*, 212 F.3d at 789.

Performing such surgery to the Affidavit filed with District Justice Steffe would produce an Affidavit that reads:[6]

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6. Changed or additional information appears in brackets.

Appendix C

(1) On July 14, 2004, Cranberry Township Police Officers were dispatched to the J&G Gulf Station for a reported robbery.

(2) The call was placed by Bob McGee from Jordan's Service Center located next to J&G Gulf Station.

(3) Mr. McGee advised the officers that the female clerk (later identified as Plaintiff) from J&G Gulf just ran into the garage and told him that she was robbed.

(4) While McGee was on the phone with 9-1-1, Plaintiff also stated that she was sexually assaulted.

(5) The actor was described as a male approximately 5'6" to 5'7" tall, wearing a blue baseball cap, blue jeans, and blue boxers.

(6) Plaintiff was unsure of which direction the actor left the area or any vehicle description.

(7) Corporal Mascellino transported Plaintiff, along with Mark Watt, Plaintiff's boyfriend, to the ER at UPMC Cranberry.

(8) Upon arriving at UPMC Cranberry, Detective Evanson was met by Corporal Mascellino.

(9) Corporal Mascellino and Detective Evanson proceeded to the room where Plaintiff was being treated.

(10) Plaintiff advised officers that at approximately 10:40 P.M. a white male [in his mid 30's to early 40's], approximately 5'6" - 5'8" in height entered the store and picked up a pack of gum then proceeded to the counter to purchase same.

(11) As he approached the counter, the suspect lifted his shirt and pulled a black semi-automatic handgun from the waist band of his pants and proceeded to point said gun at Plaintiff.

(12) Suspect then proceeded to Plaintiff's side of the counter ordering her to sit on the ground.

(13) Suspect asked Plaintiff how to open the register, at which time she told the suspect to hit the "no sale" key to open the drawer.

(14) Suspect opened the register and removed cash from same.

(15) At this time, the suspect sexually assaulted Plaintiff by forcing her to perform oral sex on him.

(16) The suspect then ordered Plaintiff to disable the telephone located in the rear office area, to which she complied and pulled telephone from the wall by pulling on the phone and throwing it on the floor in the middle of the room.

(17) Suspect then advised Plaintiff to remain in the room for five minutes after he leaves.

(18) Suspect left through the front door and fled in an unknown direction.

(19) Shortly thereafter, Plaintiff exited through the rear door of the establishment and ran to Jordan's Garage located next to the Gulf Station.

(20) Corporal Mascellino asked Plaintiff if she knew at what time the incident occurred.

(21) Plaintiff stated that it was 10:40 P.M.

(22) Prior to being released from UPMC, Plaintiff agreed to provide the officers with a written statement [at some point following the incident].

(23) [Although Detective Evanson was unable to contact Plaintiff directly the day after the incident, he did speak with Plaintiff's mother, Debbie Bosco].

Appendix C

(24) While conducting follow-up investigation of the reported robbery and assault, Plaintiff contacted Carol Hazlett, the manager of the Gulf Station, who confirmed that on July 14, 2004, she was in the store until [approximately 3:00 P.M when Plaintiff arrived for her shift.]

(25) While at home that evening, Ms. Hazlett was contacted by the station alarm company, Security Systems of America, who advised her that the power source for the alarm was interrupted and that after a one hour delay it failed to restore.

(26) The alarm company attempted to make telephone contact with the Gulf Station, but there was no answer.

(27) Ms. Hazlett at this time proceeded back to the Cranberry Township station where she was made aware of the reported robbery and assault

(28) Ms. Hazlett stated that while at the station she checked the power cord of the alarm located behind the desk in rear office and discovered that it had been unplugged.

(29) Ms. Hazlett also advised Detective Evanson that she had pulled the register tape for the night of July 14, 2004 and found that the NS (no sale) key had been pushed at 9:40

P.M. and that this time is one hour behind actual time, meaning that the NS key was pushed at 10:40 P.M.

(30) Detective Evanson asked Ms. Hazlett about the clock in the station and if it was in sync with the time on the register to which Ms. Hazlett confirmed that the wall clock is not in sync with the register clock.

(31) Ms. Hazlett also advised the reporting officer that the amount of money taken during the robbery was $606.73

(32) [Plaintiff, along with her mother and step-father, Paul Bosco, met with Detective Evanson at the Cranberry Township Police Station on July 16, 2004. While there, Plaintiff provided a written statement.]

(33) Detective Evanson met with Plaintiff and her parents to discuss the alleged assault and robbery [as well as to discuss the possibility that Plaintiff had fabricated the incident to cover for her boyfriend, Mark Watt. Further, Detective Evanson intimated that if Plaintiff confessed, nothing serious would happen to her.]

(34) Detective Evanson asked Plaintiff if during the assault, when the actor ordered her to disable the phones, if she had pulled

any other wires, and, if so, where were the wires located.

(35) Plaintiff stated that she only disabled the telephone by grabbing the base of the phone and pulling it from the wall.

(36) Detective Evanson then asked Plaintiff if the suspect disabled any wires for electricity or the alarm, and Plaintiff again replied "no," further confirming that the suspect did not go behind the desk in the rear office nor did he pull any power lines from the wall behind the desk in the rear office.

(37) Detective Evanson at this time advised Plaintiff that he had received confirmation from Security Systems of America that due to a power failure that occurred at 10:14 P.M. an alarm was signaled at 11:14 P.M.

(38) Plaintiff stated that she did not know how that would have occurred.

(39) Detective Evanson then went on to advise Plaintiff that said power failure occurred as a result of the power cord behind the desk in the rear office being unplugged.

(40) When asked how the alarm plug was pulled roughly twenty (20) minutes prior to

the robbery, Plaintiff [grew upset] and stated "I just want to drop the whole thing."

(41) When Detective Evanson advised Plaintiff that it could not be dropped due to the alleged robbery and theft she became very agitated and replied "I just want this whole thing to go away."

(42) Detective Meyer contacted Park Manager David Kriley ("Park Manager") of Green Acres Trailer Park located on Route 8 in Penn Township who provided the following information.

(43) Kriley advised that he was contacted by Mark Watt and Plaintiff sometime in mid-July at which time they were inquiring about renting a mobile home.

(44) Mark Watt and Plaintiff were told that the monthly rent would be $365.00 with a security deposit equal to one month's rent to be provided to Green Acres prior to moving in.

(45) Kriley indicated that Mark Watt and Plaintiff applied to rent a mobile home on July 19, 2004, agreeing to the monthly rental fee of $365.00.

(46) On the initial application, Catholic Charities indicated that they would provide Green Acres with $200.00 of the initial security deposit with Mark Watt and Plaintiff to provide the remaining $165.00.

(47) On July 20, 2004, Mark Watt provided Kriley with $165.00 cash to fulfill the remainder of the security deposit.

[(48) While at the hospital, Plaintiff gave consistent accounts of the robbery and assault with the same graphic detail to Corporal Mascellino and Nurse Farah.]

[(49) Plaintiff refused to speak to a representative from VOICE because she claimed she was sexually abused by her grandfather as a child and knew how to handle the situation.]

[(50) Plaintiff was treated for the sexual assault and submitted to a rape kit.]

[(51) Detective Evanson was aware of these details and he entered them into the Police Report.]

[(52) An investigation of the panic alarm during the night of the incident confirmed that if Plaintiff had attempted to press the panic alarm, it would have worked.]

> [(53) Plaintiff may not have attempted to use the panic alarm because she could have been too distraught due to a gun being pointed at her head.]
>
> [(54) Detective Evanson was the lead investigator in the only other sexual assault reported in Cranberry Township in 2004. Like Plaintiff's case, this incident involved a reported robbery in which the assailant ordered the victim, a Caucasian female, to perform oral sex prior to leaving with the money.]

("the Corrected Affidavit").

Based on this information, and after drawing all inferences in a light most favorable to Plaintiff, Detective Evanson's affidavit, as corrected, still establishes probable cause to believe that Plaintiff "reported to law enforcement authorities an offense or other incident within [her] concern knowing it did not occur." 18 Pa. C.S. § 4906(b)(1).

Plaintiff points to several false statements or omissions regarding the purpose of Detective Evanson's July 16, 2004 meeting with her and her parents. However, whether Detective Evanson had a predisposition towards Plaintiff's potential fabrication of the entire incident from the start of his investigation does not change the inculpatory information concerning Plaintiff's indecisiveness about any follow-up meeting

with Detective Evanson. Further, the actual date of the meeting is immaterial. The fact remains that although Plaintiff and her parents did actually meet with Detective Evanson at the Cranberry Township Police Station where Plaintiff provided a written statement while Detective Evanson spoke with her parents *(see* Evanson Depo. at 207:2-5), Plaintiff was unwilling to provide a firm commitment to meet with the police in follow-up on the night in question and did not make herself available until Detective Evanson continued to press the matter with Plaintiff's parents. The inference of reluctance to be available to the police was fairly raised by Plaintiff's behavior. As for the misstatements regarding Plaintiff's description of the assailant's age or the exact time Ms. Hazlett left the Gulf station, such mistakes may show that Detective Evanson did not pay sufficient attention to Plaintiff's initial report, but they are ultimately immaterial to any probable cause determination.

The most exculpatory amendments to the affidavit are the facts that Plaintiff provided graphic accounts of the robbery and sexual assault to both Corporal Mascellino and Nurse Farah, and these accounts shared very similar details. Added to the Affidavit, these additional facts show Plaintiff was consistent in her story. Further, amending the date of Plaintiff's meeting with Detective Evanson to July 16, 2004, removing the misstatement that she agreed to provide a written statement on July 15, and noting that Detective Evanson set up a line of communication with Plaintiff's mother weaken the inferences that Plaintiff was evasive and uncooperative. However, they do not destroy the

inference that Plaintiff was reluctant to submit to further interaction with the police. Detective Evanson attempted to contact Plaintiff on July 15 but was only able to reach her voice mail. That he had to make arrangements for the meeting through Plaintiff's mother permits the inference that she was trying to avoid further contact with the police.

These additional exculpatory facts do not undermine the inculpatory evidence that established probable cause in the first instance: (1) the theft occurred while Plaintiff was the sole employee in control of the premises during the premises' business hours; (2) power to the alarm system had been disabled approximately twenty (20) minutes prior to the incident; (3) the alarm system had been unplugged from its socket behind a desk in the premises' rear office; (4) Plaintiff stated the perpetrator was not in the area where the plug to the alarm system was located; (5) Plaintiff admitted that the alleged perpetrator did not disable any lines for electricity or the alarm; (6) Plaintiff could not provide any information about how the assailant had arrived at the gas station or what direction the assailant left the scene; (7) when asked why the alarm would have been pulled approximately twenty (20) minutes prior to the robbery and assault, Plaintiff grew upset and stated "I just want to drop the whole thing" and when confronted with the proposition that the matter could not be dropped Plaintiff responded "I just want this whole thing to go away;" (8) a large amount of cash was taken from the gas station; (9) Plaintiff's boyfriend was at the scene a very short time after the incident was reported; and (10)

five days after the incident, Plaintiff's boyfriend made a cash deposit of $165.00 for the rental of a mobile home that he and Plaintiff had been looking at just a few days before the incident and he and Plaintiff were prepared to make the first month's rent of $365.00. *(See* doc. no. 109 at 5).

The inculpatory information in the Affidavit provides sufficient facts and circumstances which create a fair probability that Plaintiff committed the crime of giving a false report. First, the information surrounding Plaintiff's undertakings with Mark Watt provided a motive for committing the crime: to gain access to additional cash for the purpose of obtaining a mutually shared residence. Second, by Plaintiff's own admission, she was the only individual on the premises who could have disabled the alarm system. Third, the alarm system was disabled approximately twenty minutes prior to the reported robbery and assault and no explanation as to how it was disabled had surfaced. Fourth, Plaintiff was unable to provide any information about how the perpetrator arrived at the gas station or anything about how he left the scene beyond exiting out the front door. Fifth, Plaintiff's boyfriend arrived at the scene very shortly after the crime was committed, and thus was not far from the gas station that evening. Sixth, Plaintiff reported the robbery as occurring at the exact minute the no sale key had been pushed, which suggested she was aware of the precise time the no sale key had been pushed. Seventh, Plaintiff agreed to provide a written statement of the event on the night of the crime but did not agree to a firm date and time and an additional

meeting with Plaintiff had to be arranged through Plaintiff's mother. Eight, Plaintiff grew upset and repeatedly attempted to avoid any further discussion about the incident when she was questioned about the inconsistencies involving the alarm system becoming disabled twenty minutes before the reported crime. Ninth, Plaintiff and her boyfriend paid a cash deposit after enlisting the aid of a charitable organization for a portion of the security deposit and indicated an ability to pay the first month's rent within a short period of time. In combination this represented an ability to pay $530.00 and $606.73 had been taken from the gas station.

Plaintiff has the burden of proof in establishing sufficient evidence to support her § 1983 claim for unlawful arrest and the claims related thereto. Proof that will support a finding of violation of a constitutional right is essential to these claims. The Affidavit as revised provides probable cause to believe there was a fair probability that Plaintiff committed the crimes of false report and theft of property.[7] Accordingly, defendants are entitled to summary judgment on Plaintiff's claims

7. The above analysis is based on the core information that was contained in the Affidavit submitted to District Justice Steffe. The corrected version actually contains information that adds additional support for a finding of probable cause when combined with the core information. As discussed *infra*, Plaintiff's declining professional counseling after it was offered repeatedly and the fact that she did not attempt to press the panic alarm at any time during the events happening behind the counter in the front room, while susceptible of innocent explanation, add to the quantum of information supporting a finding of probable cause.

for unlawful seizure, false imprisonment, and malicious prosecution under the Fourth Amendment, violation of liberty interests under the Due Process Clause of the Fourteenth Amendment, and false arrest, false imprisonment, and abuse of process under state law.

B. Qualified Immunity

Even if a genuine issue of fact exists as to whether Detective Evanson's affidavit, as corrected, establishes probable cause, Detective Evanson has met his burden of proving entitlement to qualified immunity. The United States Supreme Court long age recognized that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The privilege created by the doctrine is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Its goal is "to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818. And the scope of protection extends to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court established a two-part test to determine whether

a defendant is entitled to qualified immunity. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If no constitutional right was violated, "the qualified immunity inquiry is at an end; the officer is entitled to immunity." *Bennet v. Murphy*, 274 F.3d 133, 136 (3d Cir. 2002). If, however, the facts read in the light most favorable to the plaintiff show a violation of a constitutional right, the analysis proceeds to a second step: "whether the right was clearly established ... in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. A right is clearly established in the particular context if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. However, if it was not clear "to a reasonable officer what the law required under the facts alleged, then he is entitled to qualified immunity." *Kopec v. Tate*, 361 F.3d 772, 776 (3d Cir. 2004).[8]

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8. Although *Saucier* mandated that a court must first determine whether a constitutional right has been violated before examining whether the right was clearly established, the Supreme Court recently clarified that lower courts retain the discretion to determine the order of the qualified immunity analysis in order to promote judicial efficiency and avoid unnecessary analysis of difficult constitutional questions. *Pearson v. Callahan*, — U.S. —, 129 S. Ct. 808, 818 (January 21, 2009) ("On reconsidering the procedure required in *Saucier*, we conclude that while the sequence set fort there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand.").

In this setting the Third Circuit has explained: "[s]ummary Judgment is appropriate if no reasonable jury could conclude that [the plaintiff's] clearly established rights were violated." *Wilson*, at 786 (citing *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Cir. 1995)). The court continued:

> This does not mean that the jury determines the contours of that right. Rather, after making a legal determination about the existence of a right, and whether it is clearly established, we determine whether the facts on the record are such that a jury could conclude that a clearly established right was violated ... As a methodological matter, we commonly work backwards: We arrange the facts in a light most favorable to the plaintiff, and then determine whether, given precedent, those "facts," if true, would constitute the deprivation of a right. And then, if necessary, we determine if that right is clearly established.

Wilson, 212 F.3d at 786 (citation omitted). We embark on this endeavor.

Defendants essentially concede that citizens have a clearly established right not to be arrested pursuant to a warrant obtained on the basis of the affiant's deliberate falsehood for the truth in a probable cause affidavit. (doc. no. 97 at 7). But this position assumes that there were no additional facts and circumstances in the Affidavit

that provided a lawful basis for Plaintiff's arrest in any event. If there were, then the underlying right to be free from arrest without probable cause could not have been violated. Therefore, the primary inquiry is whether Defendants violated Plaintiff's Fourth Amendment rights by arresting her without probable cause.

As set forth above, this assessment essentially ends the inquiry because the Affidavit contains core facts and circumstances that created probable cause for Plaintiff's arrest. But even if it is assumed that the Affidavit as presented or corrected did not provide probable cause, defendants still are entitled to qualified immunity because it cannot be said that defendants violated plaintiff's right to be free from unlawful arrest in the specific context and circumstances that confronted them.

The constitutional validity of the arrest does not depend on whether the suspect actually committed the crime. *Wright,* 409 F.3d at 602 (citing *Johnson v. Campbell,* 332 F.3d 199, 211 (3d Cir. 2003)). "It is inevitable that law enforcement officers will in some cases reasonably but mistakenly conclude that probable cause to make an arrest is present. The Court has made clear that in such cases [the] officers, like other officials who act in ways they reasonably believe to be lawful, will not be held personally liable." *Orsatti,* 71 F.3d at 483. The test is an objective one based on what a reasonable competent officer would believe under the known facts and circumstances. *Id.* 483. Under this approach whether a police officer is immune is governed by the same

standard of objective reasonableness that applies in the context of a suppression hearing under *United States v. Leon*, 468 U.S. 897 (1984). Under this standard, immunity is lost only "where the warrant application is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" *Id.* (quoting *Malley*, 475 U.S. at 341. And "the reasonableness of an official's belief in the existence of probable cause is whether a reasonably well-trained officer would have known that his affidavit failed to establish probable cause and that he therefore should not have applied for the warrant under the conditions." *Id.* In other words, a police officer may be liable for civil damages for an unlawful arrest only if "no reasonable competent officer" would conclude that probable cause exists. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In addition to the core facts and circumstances set forth in the Affidavit, Detective Evanson had accumulated a number of other facts and circumstances bearing on the determination of whether probable cause existed for Plaintiff's arrest. Detective Evanson waited roughly six months before filing the final Affidavit (doc. no. 97 at 3). He formulated his theory that Plaintiff falsified the report of the robbery and sexual assault because she had both a motive, namely the need for money to rent a trailer with Mark Watt, and opportunity, as she was the only employee in the J&G Gulf Station on the evening of July 14, 2004. (*See* Evanson Depo. at 218:18-219:20). He knew Plaintiff was homeless at the time the incident occurred and was living in a station wagon on Mark Watt's property. (*See* Evanson Depo at

220:15-16; Reedy Depo. at 124:8-22). He knew they both were looking to rent a trailer and needed the money to do so. (Evanson Depo. at 220:9-10). From conversations with the J&G Gulf manager, Ms. Hazlett, and Plaintiff's mother, Debbie Bosco, he became aware that upon engaging in a relationship with Mark Watt, her performance at work and school began to slip and she started using marijuana. (Evanson Depo. at 178:12-179:10, 208: 14-209:10). This change in behavior led to a "falling out" between Plaintiff and her mother. (Reedy Depo. at 124:11-14). Furthermore, he also knew that Plaintiff reported that (1) the safe was left open in the backroom at 10:40 p.m.; (2) the perpetrator committed the robbery and sexual assault out in front of the gas station "were everyone could see;" (3) the perpetrator then ordered Plaintiff into the backroom and followed her into it whereupon she disabled the telephone; (4) the perpetrator came to focus on the safe and asked Plaintiff if there was any money in it; (5) Plaintiff took additional cash from the safe and gave it to the perpetrator before he exited out the front door; (6) Plaintiff did not report attempting to press the panic alarm; and (7) Plaintiff declined professional counseling by a victim's rights group.

In addition to the facts and circumstances in the final Affidavit providing a firm basis to believe Plaintiff had motive and opportunity, was reluctant to further meet and discuss the matter with the police, had made statements suggesting she had a guilty conscience about the matter, had engaged in preplanning the theft, had provided details which suggested she knew precisely

when the cash register had been opened, and had acquired a trailer that required a sum of money comparable to the amount take, Plaintiff's living arrangements, recent spiral into the use of controlled substances and downward turn in her relation with her mother, not pressing the panic button, declining victim counseling, and the series of events reported about how the perpetrator came to be in the backroom where the safe was open with additional money being in it at 10:40 p.m., added additional circumstantial information to support a reasonable belief that there was a fair probability that Plaintiff had inside information about the funds reported as stolen. The circumstances surrounding her living arrangements and recent drug use added to the circumstances indicating she had a motive for the crime. The fact that no attempt had been made to press the panic button added to the circumstances surrounding the alarm system that suggested there was preplanning involved. The decision to decline counseling services added to the circumstances suggesting an event separate from the one reported had occurred. The reported series of events explaining how the perpetrator had came to know the safe was left open at 10:40 p.m. added to the circumstances suggesting Plaintiff had opportunity and had engaged in preplanning the theft. Furthermore, there is evidence, not discussed in the Affidavit, that during a meeting, Plaintiff and Detective Evanson set a date for a polygraph examination, but Plaintiff failed to appear on that date, which added to the inference that Plaintiff was unwilling to provide additional assistance to the police to dispel their belief that she was involved. (*See* Mannell Depo. at 95:8-23).

Appendix C

The standards for qualified immunity in a probable cause determination provide that "[a] police officer may be liable for civil damages for an arrest if no reasonable competent officer would conclude that probable cause exists." *Wilson*, 212 F.3d at 786. If reasonably competent officers could disagree, then an officer is immune from suit. *Id.* These observations stem from the teachings of the Supreme Court emphasizing that before there can be civil rights liability where the doctrine of qualified immunity has been invoked, the "contours of the right must be sufficiently clear," and in making this assessment

> [t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted .... If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

Saucier, 533 U.S. at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the present case, it is not clear that "no reasonable competent officer" would conclude that probable cause exists. Contrary to Plaintiff's contentions, the Affidavit, either in the original final draft or the "corrected" version, does not appear to be "so lacking in indicia of probable cause as to render

official belief in its existence unreasonable." *See id.* at 345-46. As explained above, the Affidavit contained ample core facts and circumstances from which a judicial officer could conclude that there was a fair probability that Plaintiff committed the crimes of giving a false report and theft of property. And the additional facts known to Detective Evanson at the time merely provided additional grounds to support a reasonable belief that the totality of the circumstances created probable cause for Plaintiff's arrest.

As previously noted, the qualified immunity doctrine "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). And even if it is true that officers of reasonable competence could disagree as to whether there was probable cause based on either the final or "corrected" version of the Affidavit, disagreement among officers of reasonable competence is not enough to remove the cloak of immunity. *See Malley*, 475 U.S. at 341.

Here, at the very best, reasonable competent officers confronted with the acquisition of a warrant based on the core facts in the Affidavit and viewing the additional facts known to Detective Evanson objectively could reasonably disagree as to whether probable cause existed for Plaintiff's arrest. Consequently, even drawing all inferences in a light most favorable to Plaintiff, a jury could not conclude that no reasonable competent officer would fine probable cause in this

instance. Thus, Detective Evanson's qualified immunity defense must be upheld.[9]

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9. Plaintiff's contention that Detective Evanson's failure to include information surrounding the Landmark Attack would have negated probable cause cannot stand. Plaintiff bases this contention on Detective Evanson's failure to connect the two attacks. *(See* doc. no. 103 at 23). As previously noted, Plaintiff intends to offer expert testimony from Corporal Cronin of the Pennsylvania State Police that these similarities are relevant and "fairly obvious," and that he would expect a detective who was investigating both of these cases to recognize these similarities. *(Id.)*. However, while a police officer cannot simply ignore or omit exculpatory evidence in an affidavit of probable cause, *Wilson,* 212 F.3d at 790, "[o]nce a police officer has discovered sufficient facts to establish probable cause, the officer has no constitutional duty to further investigate in hopes of finding exculpatory evidence." *Patterson* v. *Sch. Dist. Of Phila,* Civ. A. No. 99-4792, 2000 U.S. Dist. LEXIS 10245, at *6 (E.D. Pa. July 19, 2000). Because the circumstances when viewed objectively supported the view that Detective Evanson reasonably could have believed he had probable cause indicating Plaintiff filed a false police report and been involved in taking money from the Gulf station, he did not need to expend additional effort connecting these two incidents.

It is true that Detective Evanson could have done a more thorough investigation surrounding Plaintiff's case and perhaps should have connected the Landmark Attack with Plaintiff's robbery and assault. But to the extent that Plaintiff is arguing that Detective Evanson was negligent in his investigation, negligent conduct alone "provides an insufficient bases on which to find a [Fourth Amendment] violation." *Barton v. Curtis,* Civ. A. No. 2005-2, 2008 U.S. Dist. LEXIS 96855, at *33 (D. V.I. Nov. 25, 2008) (citing *Miller v. Prince George's County,* 475 F.3d 621, 627-28 (4th Cir. 2007) ("A plaintiff's 'allegations of

(Cont'd)

Appendix C

C. Plaintiff's Unlawful Search Claim regarding Blood Sample

Plaintiff claims Detective Evanson conducted an unreasonable search under the Fourth Amendment by ordering a toxicology screen on a blood sample taken from her on the night of the incident. (doc. no. 103 at 26-27). She points to the form marked "Passavant Hospital Authorization for Collection and Release of Evidence and Information," signed that night, which permitted "Dr. Jones, M.D., his medical and nursing assistants and associates to conduct an examination to collect evidence concerning an alleged sexual assault." (doc. no. 98, exh. L). Plaintiff asserts this form did not authorize Detective Evanson to request the hospital to test her blood for drugs. Plaintiff also points to a Health Information Portability and Accountability Act ("HIPAA") form (doc. no. 98, exh. M), executed on September 24, 2004, which she claims only authorized Detective Evanson to deliver her medical records to her worker's compensation attorney. These forms purportedly fall short of permitting Detective Evanson to subject her blood to a toxicology screening.

(Cont'd)

negligence or innocent mistake' by a police officer will not provide a basis for a constitutional violation.") (quoting *Franks*, 438 U.S. at 171)). Similarly, negligence by a public official is not actionable as a violation of the Due Process Clause. *See Orsatti*, 71 F.3d at 484. Therefore, Plaintiff's claims fail to the extent she argues that her constitutional rights were violated by negligence on the part of Detective Evanson in his investigation.

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Obtaining physical evidence from a person "implicates a Fourth Amendment right only when 'the bodily seizure requires production of evidence below the body surface which is not subject to public view.'" *Williams v. Lancaster,* 639 S. Supp. 377. 382 (E.D. Pa. 1986) (citing *In re Grand Jury Proceedings,* 686 F.2d 135, 139 (3d Cir. 1982) (upholding compelled production of hair samples)). The Supreme Court has prohibited forced invasions below the body surface, such as blood samples, *Schmerber v. California,* 384 U.S. 757 (1966), and fingernail scrapings, *Cupp v. Murphy,* 412 U.S. 291 (1973). But it also has held that the Fourth Amendment "provides no protection for what a person knowingly exposes to the public." *United States v. Dionisio,* 410 U.S. 1, 14 (1973) (permitting voice exemplars).

Plaintiff is not challenging the actual drawing of hre blood; her contention is limited to Detective Evanson's request for a toxicology screening from blood that was drawn with her consent. The Authorization for Collection and Release of Evidence and Information states:

> I, Sara Reedy, freely consent to allow Dr. Jones, M.D., his medical and nursing assistants and associates to conduct an examination to collect evidence concerning an alleged sexual assault. This procedure has been fully explained to me and I understand that this examination will include tests for the presence of sperm and sexually transmitted diseases, infections diseases, as well as clinical

> observation for physical evidence of penetration of or injury to my person, or both, and the collection of other specimens and blood samples for laboratory analysis.
>
> I fully understand the nature of the examination and the fact that medical information gathered by this means may be used as evidence in a court of law or in connection with enforcement of public health rules and law.
>
> I do ... authorize the hospital and its agents to release the laboratory specimens, medical records and related information pertinent to this incident, including any photographs, to the appropriate law enforcement officials, and I herewith release and hold harmless the hospital and its agents from any and all liability and claims of injury whatsoever which may in any manner result from the authorized release of such information.

(doc. no. 98, exh. L). By signing this agreement, Plaintiff consented to have her blood drawn. Once drawn, Plaintiff lost any reasonable expectation of privacy in that blood because any subsequent testing did not involve an intrusion below the bodily surface. *See Williams*, 639 F. Supp. at 382 (holding that a black light examination for hair was not an unreasonable search, even though the ultraviolet light disclosed traces invisible to the public, because it did not involve an

intrusion below the bodily surface). Furthermore, any type of toxicology screening would fall within the scope of the authorization, which included "the collection of other specimens and blood samples for laboratory analysis." Thus, she released any reasonable expectation of privacy in the content of her blood and Detective Evanson's ordering of a toxicology screening could not have violated her Fourth Amendment rights.

Moreover, Plaintiff has not pointed to any evidence suggesting that Detective Evanson did not also request the screening as part of his investigation into the alleged robbery and sexual assault. Although Plaintiff may not agree, a negative screening may well have assuaged his belief that Plaintiff was implicated in the reported theft. Thus, the testing falls squarely within the perimeters of the consent voluntarily given. For these reasons, Detective Evanson did not conduct an unreasonable search under the Fourth Amendment.

D. Plaintiff's Claims as to Mannell and Meyer

Plaintiff claims that Public Safety Director Mannell participated in the investigation of Plaintiff in a way that violated her Fourth and Fourteenth Amendment rights, and also claims that Detective Meyer deprived her of liberty without due process of law under the Fourteenth Amendment. As discussed above, however, Detective Evanson established probable cause through the Affidavit, thereby precluding a determination that Mannell and Meyer engaged in conduct which amounted to a constitutional violation. Furthermore, in an opinion

issued on August 9, 2008 (Doc. No. 55), this court made clear the elements Plaintiff had to satisfy in establishing liability against Mannell. Plaintiff's submissions fall woefully short of presenting sufficient evidence to meet those elements. Similarly, Plaintiff is unable to point to anything that Detective Meyer did beyond accompanying Detective Evanson during his encounters with Plaintiff. Accordingly, he is entitled to the same qualified immunity that extends to Detective Evanson; and Safety Director Mannell is entitled to summary judgment for this reason as well as Plaintiff's failure to meet the standards needed to impose liability under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

D. Intentional Infliction of Emotional Distress

Plaintiff brings a claim of intentional infliction of emotional distress, asserting that Detectives Evanson and Meyer's conduct prior and subsequent to her arrest was "extreme and outrageous." (doc. no. 103 at 33). To sustain a claim for intentional infliction of emotional distress, a plaintiff must show "extreme and outrageous conduct which is deliberate and which causes severe emotional distress." *McClain v. Munn*, Civ. A. No. 06-278, 2008 U.S. Dist. LEXIS 28985, at 13-17 (W.D. Pa. April 9, 2008) (citing *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988 (Pa. 1987)). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citing *Kazatsky*, 527 A.2d at 991).

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Plaintiff cites to no authority to support her contention that the conduct of Detectives Evanson and Meyer was "extreme and outrageous." To begin, there is no evidence that they acted with an improper motive or purpose. Any reading of the record is limited to the basic proposition that they were acting to solve crimes that had been committed within their jurisdiction. They harbored neither an improper motive nor a nefarious agenda. Thus, their conduct is nothing more than inaccurate or over zealous police work at best.

And even when Plaintiff's accusations of misrepresentation and omissions are taken into account, the arresting and imprisoning of Plaintiff does not rise to the level of conduct that is so outrageous in character, or so extreme in degree, as to support a claim for intentional infliction of emotional distress. This proposition is well established. For example, in *Gilbert v. Field*, 842 F. Supp. 803, 821 (E.D. Pa.1993), claims that a county detective instituted plaintiff's arrest without probable cause, arrested him in front of his grandmother, placed him in handcuffs and made him walk five or six blocks, transferred him to another jail without instructions to do so, detained him for several hours before his arraignment, persuaded him to waive his arraignment in Philadelphia until he was transferred to Montgomery County, re-arrested him without probable cause, and signed an affidavit of probable cause despite knowing it was false was held not to be so outrageous as to constitute a claim for intentional infliction for emotional distress. Additionally, in *Sieger v. Township of Tinicum*, Civ. A. No. 89-5236, 1991 U.S.

Dist. LEXIS 13176, at *5 (E.D. Pa. Sept. 30, 1991), claims that a township executive official knowingly issued a series of citations without probable cause and testified falsely at a hearing on the citations were deemed not to rise to the requisite level of outrageousness.

In short, Detectives Evanson and Meyer conducted an investigation of Plaintiff's case and during that investigation developed a theory that she falsified her police report and was involved with the theft of the money taken from J&G Gulf. While they may have botched the investigation, been unkind to Plaintiff and even harassed her during this investigation, such conduct does not rise to the requisite level of outrageousness. Consequently, summary judgment must be granted on this claim as well.

VI. CONCLUSION

For the foregoing reasons, no reasonable jury could conclude that (1) the Affidavit, as corrected, did not establish probable cause, (2) Detective Evanson did not have probable cause to arrest Plaintiff, and (3) that no reasonable officer could believe objectively under the known facts and circumstances that probable cause did not exist to arrest Plaintiff on the charges of making a false report and theft of property. These shortcomings extend to Public Safety Director Mannell and Detective Meyer. Plaintiff has failed to establish the elements necessary to impose liability under *Monell* against Safety Director Mannell. In addition, no reasonable jury could conclude that Detective Evanson conducted an

unreasonable search of Plaintiff's blood under the Fourth Amendment or that defendants' conduct was extreme and outrageous. Therefore, Defendants' Motion for Summary Judgement properly was granted.

Date: April 20. 2009

/s/
David Stewart Cercone
United States District Judge

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APPENDIX D — AUGUST 30, 2010 ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2210

SARA R. REEDY,

Appellant

v.

FRANK S. EVANSON,
individually and in his official capacity as a Police Officer of the Township of Cranberry;

STEVE MANNELL,
individually and his official capacity as the Public Safety Director of the Township of Cranberry;

KEVIN MEYER,
individually and in his official capacity as a Police Officer of the Township of Cranberry;

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 07-cv-1080)
District Judge: Honorable David Stewart Cercone

Appendix D

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE, and VAN ANTWERPEN,* *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: August 30, 2010
CJG/cc: David V. Weicht, Esq.
Charles W. Craven, Esq.
Terry L. Fromson, Esq.

* Judge Van Antwerpen's vote is limited to panel rehearing only.

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(4)

No. 10-701

IN THE

Supreme Court of the United States

FRANK S. EVANSON,

Petitioner,

v.

SARA R. REEDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Neither Petitioner nor the *amicus curiae* have presented any "compelling reasons" for this Court to grant the Petition for Certiorari ("Petition"). Sup. Ct. R. 10 ("[a] petition for writ of certiorari will be granted only for compelling reasons"). The United States Court of Appeals for the Third Circuit ("Court of Appeals") applied both the correct standard for determining whether a police officer is entitled to qualified immunity for an unlawful arrest in the context of a motion for summary judgment and the law regarding an officer's warrantless testing of a citizen's blood. Accordingly, and despite the Petitioner's assertions to the contrary, the decision of the Court of Appeals did not "depart[ ] so far from the controlling precedents of this Court [nor] so conflict[ ] with other controlling decisions as to require the exercise of this Court's supervisory powers to maintain uniformity of decisions on federal law." Petition at 9.; *see also* Brief in Support of Petitioner's Petition for Writ of Certiorari Filed by Amicus Curiae[1] at 8.

COUNTERSTATEMENT OF THE CASE

On July 14, 2004, Respondent Sara Reedy ("Reedy"), then nineteen years old, was working alone as a cashier at a Gulf Gas Station in Cranberry Township, Pennsylvania, when an unknown male approached her at the store counter. Court of Appeals

1. Brief in Support of Petitioner's Petition for Writ of Certiorari Filed by Amicus Curiae will hereafter be referred to as BAC.

Appendix at 347a, 350a, 353-55a, 460a-62a, 500a-01a. The man removed a black handgun from his pants and ordered Reedy to sit on the floor behind the counter while he removed money from the cash register. *Id.* at 350a, 353a-55a, 460a-62a. He then sexually assaulted Reedy by forcing her to perform oral sex upon him under threat of death. *Id.* at 350a, 353a-55a, 460a-62a, 500a-01a. After the assault, the assailant directed Reedy to the store's rear office where he removed two envelopes of cash from a safe and ordered Reedy to rip the phone lines from the wall. *Id.* 350a, 353a-55a, 460a-62a, 500a-01a. Reedy was ordered to remain in the office for five minutes while her assailant escaped. *Id.* at 354a-55a. After waiting for the assailant to leave the premises, Reedy fled to a nearby service station where an employee called 911. *Id.* at 350a-51a, 354a-55a, 461a, 501a.

The Cranberry Township Police arrived at the scene of the assault and robbery, and Reedy provided detailed information regarding the assault and the assailant to multiple police officers. *Id.* at 350a-55a, 460a-62a. She was subsequently taken to the hospital for treatment, examination, and to gather evidence of the sexual assault. *Id.* at 350a, 354a, 462a. While awaiting treatment, Reedy gave consistent and detailed accounts of the events to the Cranberry Township Police officers and to a nurse who both treated Reedy and performed a "rape kit" on her. *Id.* at 304a-55a, 500a-01a.

Petitioner Frank S. Evanson ("Evanson") was the lead detective assigned to investigate the robbery and assault. *Id.* at 350a-353a. He travelled to the hospital where he confronted Reedy and accused her of fabricating the robbery and assault in order to steal

money to support an alleged, but non-existent, heroin habit. *Id.* at 396a-397a, 462a. Reedy denied the accusation and told the hospital staff that Evanson was accusing her of lying. *Id.* at 396a-397a, 462a, 500a. Evanson, without a warrant or Reedy's consent, directed the hospital to perform toxicology testing on Reedy's blood, which had been drawn during the "rape kit" evaluation. *Id.* at 351a.

In the early hours of July 15, 2004, while Reedy remained at the hospital, Evanson requested that she provide a written statement and mentioned that she might come to the police station the following day. *Id.* at 400a. The next day, July 16, 2004, Reedy travelled to the Cranberry Township Police Station with her mother and stepfather, where she provided a detailed written statement, including information regarding Evanson's inappropriate conduct towards her. *Id.* at 401a-403a, 417a-421a, 446a, 460a-462a. As Reedy wrote her statement, Evanson spoke with her mother and stepfather and indicated that Reedy and her boyfriend were responsible for the theft from the gas station and that the case would shortly be resolved. *Id.* at 447a-450a. Evanson also advised them the he could make things easier for Reedy if she would confess. *Id.* at 447a-450a, 457a.

Evanson and the rest of the Cranberry Township Police focused on Reedy as the suspect in the robbery of the gas station, and they made no effort to locate Reedy's assailant. *Id.* at 350a-359a. On August 17, 2004, Evanson and another detective visited Reedy at her residence and pressured her to change her statement. *Id.* at 406a-409a, 674a. The detectives threatened to jail

both Reedy and her boyfriend for the theft if she did not confess to taking the money. *Id.* at 406a-09a, 674a.

On October 13, 2004, nearly three months after Reedy was attacked, another woman was sexually assaulted and robbed while leaving the Landmark Building in Cranberry Township ("Landmark Attack"). *Id.* at 350a, 505a-507a. The Landmark Attack, which was the only other reported sexual assault in Cranberry Township in 2004, was nearly identical to Reedy's attack and was also investigated by Evanson. *Id.* at 429a-430a, 437a-438a, 505a-507a. During the Landmark Attack, a man with a physical description similar to Reedy's assailant sexually assaulted and robbed a woman while she was leaving work less than two miles from the location of Reedy's attack. *Id.* at 347a-355a, 502a-514a, 515a-516a. In addition to the physical description of the assailant and the location of the assault, the Landmark Attack bore several additional similarities to the attack on Reedy: both assailants used a black handgun; both attacks occurred at the same time of night; both victims were robbed and sexually assaulted; and both victims were required to perform the same sex act. *Id.* at 347a-355a, 502a-514a.

In January 2005, six months after Reedy was assaulted and three months after the Landmark Attack, Evanson began drafting an Affidavit of Probable Cause for Reedy's arrest. *Id.* at 349a, 707a-714a. Evanson sent a draft version to the local assistant district attorney, William Fullerton. *Id.* at 693a-694a, 707a-714a. Fullerton skimmed the draft and advised Evanson to revise it before he would take the time to review it in detail. *Id.* at 695a-696a, 725a. In addition, Fullerton informed

Evanson that he needed to include a description of the evidence that made out the elements of a crime and asked Evanson about the charges he intended to file. *Id.* at 695a-96a, 725a. Although Fullerton expected to review another draft of the Affidavit before charges were ultimately filed, Evanson neither sent a revised draft nor answered Fullerton's questions regarding what charges he would seek. *Id.* at 697a-699a, 702a. Fullerton never saw the final Affidavit or any other version of the documents filed against Reedy until after Evanson had lodged them with the local magistrate. *Id.* at 699a-700a, 703a-704a. Evanson, moreover, did not add additional information or evidence to the final version of the Affidavit. The changes he made consisted primarily of removing large portions of information from the draft Affidavit. *Id.* at 708a-714a, 224a-226a.

On January 14, 2005, Evanson learned from the Pennsylvania State Police that the Landmark Attack was linked to other similar attacks throughout Pennsylvania that were believed to have been committed by a serial rapist. *Id.* at 511a-512a, 609a. On the same day, now six months after Reedy's assault, Evanson filed a Criminal Complaint and Affidavit of Probable Cause against her. *Id.* at 221a-226a.

The Affidavit asserted only the following:[2]

(1) On July 14, 2004, Reedy reported to Robert McGee that she had been attacked and robbed by an unknown assailant. *Id.* at 191a.

2. Reedy has always maintained "that the Affidavit not only lacked probable cause on its face, but that it contained material

(Cont'd)

(2) Reedy provided McGee with a description of the assailant but was unsure of the direction in which the assailant left the area or a description of his vehicle. *Id.* at 191a-192a.

(3) Corporal Mascellino of the Cranberry Township Police Department transported Reedy and her boyfriend to the hospital. *Id.* at 192a.

(4) Reedy provided Evanson and Mascellino with a description of the assailant and the details of the robbery that began at 10:40 p.m. *Id.* at 192a-194a.

(5) Prior to leaving the hospital, Reedy agreed to provide a written statement to the police on July 15, 2004. *Id.* at 194a.

(6) Evanson attempted but was unable to contact Reedy for several days beginning on July 15, 2004. *Id.* at 194a.

(7) Evanson spoke with Carol Hazlett, the manager of the Gulf Gas Station, and learned that the power for the store's alarm system was interrupted that night and the security company

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(Cont'd)
falsehoods and omissions." Petitioner's Appendix at 29a. The District Court "agreed with Reedy that . . . the Affidavit suffered from recklessly-made false statements and omissions[,]" *id.* at 31a, and Evanson did "not directly challenge the District Court's findings of false statements and omissions" before the Court of Appeals, *id.* at n. 24.

unsuccessfully attempted to contact the store. *Id.* at 194a-195a.

(8) Hazlett returned to the store, learned of the robbery and assault, and found that the power cord for the alarm system had been unplugged. *Id.* at 195a.

(9) Reedy's statement regarding the assailant pressing the "No Sale" key matched the time indicated on the register tape. *Id.* at 195a-196a.

(10) Hazlett advised Evanson that $606.73 was taken during the robbery. *Id.* at 196a.

(11) On July 23, 2004, Evanson met with Reedy and her mother to discuss the alleged assault and robbery. *Id.* at 196a.

(12) Evanson asked Reedy if she pulled any other wires during the attack and Reedy stated that she only disabled the telephone. *Id.* at 196a.

(13) Evanson asked Reedy if the assailant disabled the electricity for the alarm system and Reedy advised that he did not. *Id.* at 197a.

(14) Evanson told Reedy that the security company reported that the power failed for the security system at 10:14 p.m. and Reedy stated that she did not know how this occurred. *Id.* at 197a.

(15) When Evanson told Reedy that the power failed as a result of the power cord in the rear office being unplugged and questioned how this would

have occurred, Reedy became verbally abusive and stated that she "just wanted to drop the whole thing." *Id.* at 197a.

(16) When Evanson told Reedy that the matter could not be dropped, Reedy became agitated and stated, "I just want this whole thing to go away." *Id.* at 198a.

(17) Detective Meyer learned that Mark Watt and Reedy had contacted David Kriley in mid-July regarding renting a trailer with a monthly rental fee of $365.00 and a security deposit in the same amount. *Id.* at 198a.

(18) On July 19, 2004, Watt and Reedy applied to rent the mobile home and listed on the initial application that Catholic Charities would pay $200.00 of the security deposit and Watt and Reedy would pay the remaining $165.00. *Id.* at 198a-199a.

(19) On July 20, 2004, Watt paid the remaining $165.00 of the security deposit in cash. *Id.* at 199a.

Based on this Affidavit, Reedy was charged with three crimes arising out of the incident at the Gulf Gas Station: theft, receiving stolen property, and making false reports to law enforcement authorities. *Id.* at 222a.

Reedy was notified that a warrant had been issued for her arrest and promptly surrendered to the authorities at the local magistrate's office on January

19, 2005. *Id.* at 149a. Her cash bond was established in the amount of $5,000.00. *Id.* Unable to post bond, Reedy was taken into custody and spent five days in jail awaiting a bail reduction hearing. *Id.*

Reedy's criminal trial was scheduled to begin in September 2005. *Id.* at 149a. In August, Wilbur Brown was apprehended by another police force while assaulting a female convenience store clerk in Brookville, Pennsylvania. *Id.* at 149a-150a, 199a, 219a. Brown confessed to both the attack on Reedy and the Landmark Attack. *Id.* at 149a-150a, 219a. The charges against Reedy were dropped by the district attorney's office on September 1, 2005. *Id.* at 150a.

On August 14, 2006, Reedy filed a Complaint in the United States District Court for the Western District of Pennsylvania ("District Court") against Evanson and others. *Id.* at 61a-79a. In March 2008, she filed an Amended Complaint alleging § 1983 claims of unlawful search for the testing of her blood, unlawful seizure, false imprisonment, malicious prosecution, harm to liberty interest, and a variety of state law claims. *Id.* at 98a-115a. Evanson filed a Motion for Summary Judgment on July 1, 2008, arguing, among other things, that probable cause existed to arrest Reedy and/or that he was entitled to qualified immunity with respect to the arrest. *Id.* at 164a-167a.

In ruling on the Motion for Summary Judgment, the District Court agreed with Reedy that the Affidavit of Probable Cause filed by Evanson contained both false statements and material omissions. *Id.* at 20a-27a. As a result, the District Court reconstructed affidavit and

used the "Corrected Affidavit" to determine the existence of probable cause and qualified immunity. *Id.* at 20a-31a. The District Court nonetheless found that the Corrected Affidavit demonstrated probable cause for Reedy's arrest and/or that Evanson was entitled to qualified immunity. Evanson's Motion for Summary Judgment was granted on March 31, 2009. *Id.* at 3a-6a.

Reedy timely appealed, and the Court of Appeals vacated in part, reversed in part, and affirmed in part. Petitioner's Appendix[3] at 4a. Relevant to the instant Petition, the Court of Appeals explained, among other things, that when reviewing a grant of summary judgment, all facts must be viewed "in the light most favorable to the non-moving party, who is 'entitled to every reasonable inference that can be drawn from the record.'" *Id.* at 23a. (quoting *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000)). With respect to qualified immunity, the Court of Appeals noted that a defendant police officer will not be entitled to summary judgment "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue . . . ." *Id.* at 55a. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Court of Appeals concluded that the District Court had applied the correct approach to deciding qualified immunity in the context of a summary judgment motion, but had, among other things, acted contrary to the summary judgment standard when it "failed to consistently interpret the record in the light most

3. Petitioner's Appendix will hereafter be referred to as Pet.Appx.

favorable to Reedy." *Id.* at 36a. Accordingly, the Court of Appeals held that

> [v]iewing the facts in the light most favorable to Reedy, no reasonably competent officer could have concluded at the time of Reedy's arrest that there was probable cause for the arrest. In addition, summary judgment on Evanson's defense of qualified immunity cannot stand. The availability of the defense must be decided after fact finding by the jury to determine whether the facts as recounted by Evanson or by Reedy are more credible.

Id. at 75a. Further, the Court of Appeals determined that Evanson should not have received summary judgment for the testing of Reedy's blood. *Id.* at 71a. Such testing constituted a "warrantless search . . . for drug use, without Reedy's consent, [and] violated the Fourth Amendment." *Id.*

REASONS FOR DENYING THE PETITION

Evanson has advanced three arguments for this Court to grant the Petition and enter a writ of certiorari. Petition at i. First, he, along with the *amicus curiae*, contends that the Court of Appeals improperly applied the doctrines of summary judgment and qualified immunity. *Id.* Second, Evanson briefly argues that the Court of Appeals held that qualified immunity only exists for law enforcement personnel when they make difficult, split-second decisions. *Id.* Lastly, Evanson asserts that the Court of Appeals wrongly determined that he was not entitled to summary judgment for the warrantless

testing of the Reedy's blood. *Id.* None of those arguments have merit. No compelling reasons have been presented for this Court to review the decision of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY ARTICULATED AND APPLIED THE STANDARD FOR DETERMINING WHETHER EVANSON WAS ENTITLED TO QUALIFIED IMMUNITY AT SUMMARY JUDGMENT.

At summary judgment, courts, as the Court of Appeals correctly articulated and explained, must view the facts "in the light most favorable to the non-moving party[,]" Pet.Appx. at 23a (quoting *Merkle*, 211 F.3d at 788), and if faced with a claim of qualified immunity, use those facts to determine whether a "reasonably competent officer would have concluded that a warrant should issue," *id.* at 55a (quoting *Malley*, 475 U.S. at 341). Evanson and the *amicus curiae* take a contrary position, one that fails to recognize the clearly established interplay between the doctrines of summary judgment and qualified immunity. Evanson's primary contention is that, in the context of a false arrest claim, no precedent "indicates that the historical facts for the arrest or for the arrest warrant affidavit are to be viewed in a light most favorable to the arrestee to determine probable cause and qualified immunity." Petition at 13.

That proposition is clearly contradicted by well established law. In fact, this Court addressed a claim of qualified immunity at summary judgment in *Saucier v. Katz*, 533 U.S. 194 (2001), a case upon which Evanson

relies. Although finding immunity to be proper in the circumstances presented, this Court explained that "[a] court required to rule upon the qualified immunity issue must consider, then, this threshold question: **Taken in the light most favorable to the party asserting the injury,** do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201 (emphasis supplied); *see also id.* (noting that where a constitutional "violation could be made out on a **favorable view of the parties' submissions,**" courts must examine whether the violated constitutional right was clearly established (emphasis added)).

Other decisions of this Court also demonstrate that the facts used for determining qualified immunity at summary judgment must be taken in the light most favorable to the non-moving party. In *Scott v. Harris*, 550 U.S. 372 (2007), a decision absent from Evanson's argument, this Court stated, when discussing whether a law enforcement officer's conduct violated the Fourth Amendment in a § 1983 case, that

> [t]he first step in assessing the constitutionality of [the officer's] actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's versions of events (unsurprisingly) differs substantially from [the officer's] version. When thing are in such a posture, **courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'**

> **In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of events.**

Scott v. Harris, 550 U.S. 372, 378 (2007) (emphasis added and citations omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) (explaining that on remand in a civil suit for an alleged Fourth Amendment violation at the summary judgment stage, "it should first be determined whether **the actions the [plaintiffs] allege [the officer] to have taken** are actions that a reasonable officer could have believed lawful . . . [, and i]f they are, the[officer] is entitled to dismissal" (emphasis added)).

Prior decisions from the Court of Appeals follow the standards established in *Saucier* and *Scott*. *See Merkle*, 211 F.3d at 788-90 (explaining that "[i]n addressing a motion for summary judgment, **the facts must be viewed in the light most favorable to [the non-moving party], and she is entitled to every reasonable inference that can be drawn from the record**" and that after "[v]iewing the facts in the light most favorable to [the non-moving party] . . .[, t]he question therefore becomes **whether a reasonable person in [the officer's] position could have concluded, based on this knowledge, that [the non-moving party] had committed a crime**" (emphasis added)); *see also Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000) (noting that in an unlawful arrest case, when deciding whether qualified immunity applies at summary judgment, courts "arrange the facts in the light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute a deprivation of a right").

Other courts of appeals have also explained that "[i]f the facts, construed as they must be in [a] summary judgment appeal in the light most favorable to the plaintiff, show that a constitutional right has been violated, another inquiry is whether the right violated was clearly established . . . [because b]oth elements . . . must be present for an official to lose qualified immunity." *Brown v. City of Huntsville*, 608 F.3d 724, 734 (11th Cir. 2010)(quotation marks and citation omitted); *see also Reardon v. Wroan*, 811 F.2d 1025, 1030 (7th Cir. 1987) (finding defendants "not entitled to qualified immunity" at summary judgment because it "[wa]s clear [their] conclusions with respect to the existence of probable cause could be found to be objectively unreasonable when the facts are viewed in the light most favorable to plaintiffs").

Accordingly, support for the analysis performed by the Court of Appeals exists in the decisions of this Court, the Court of Appeals itself, and other courts of appeal. Despite citing numerous cases, Evanson and the *amicus curiae* have failed to locate any that require, or even suggest, that courts not view the facts in the light most favorable to the non-moving party when deciding a claim of qualified immunity at summary judgment. The cases upon which they rely fall into four categories, none of which support granting the Petition. First, they cite criminal cases that do not involve summary judgment or qualified immunity. *See Ornelas v. United States*, 517 U.S. 690 (1996); *Franks v. Delaware*, 438 U.S. 154 (1978); *Hill v. California*, 401 U.S. 797 (1971); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Arvizu*, 534 U.S. 266 (2002). Second, they direct this Court's attention to civil cases not involving summary judgment.

See Malley, 475 U.S. at 335; *Baker v. McCollan*, 443 U.S. 137 (1979); *Carswell v. Borough of Homestead*, 381 F.3d 235 (3d Cir. 2004); *Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003). Third, they rely on cases that, while involving summary judgment and qualified immunity, do not have facts in dispute. *See Wright v. City of Philadelphia*, 409 F.3d 595, 599 (3d Cir. 2005) ("[t]he material facts here are not in dispute . . . [and t]he issue before us is the purely legal question of whether the facts alleged, even in the light most favorable to [the non-moving party], were legally sufficient to establish probable cause for her arrest"); *see also Orsatti v. New Jersey State Police*, 71 F.3d 480, 481 (3d Cir. 1995) ("[b]ecause we find that the undisputed material facts of record establish that it was objectively reasonable for the officers to conclude that they had probable cause to arrest . . . , we hold that the officers are immune from" suit); *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425 (3d Cir. 2000); *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000). Finally, they cite to cases which actually stand for the proposition that at summary judgment, facts are to be viewed in the light most favorable to the non-moving party when addressing qualified immunity. *See Anderson*, 483 U.S. at 646 n. 6; *Saucier*, 533 U.S. at 201; *Wilson*, 212 F.3d at 786; *Merkle*, 211 F.3d at 788-90; *Wright*, 409 F.3d at 603 (although "[l]ooking at the facts in the light most favorable to [plaintiff]," the court determined that the officers were entitled to qualified immunity at summary judgment).

Notwithstanding Evanson's claim to the contrary, *see* Petition at 10-13 (arguing that the Court of Appeals "completely ignored" all of the cases Evanson cites), many of those opinions were actually used by the Court

of Appeals in reaching its decision, *see* Pet.Appx. at 23a (citing *Merkle*), 25a (citing *Orsatti*), 29a (citing *Wilson*), 31a (citing *Franks*), at 53a (citing *Wright*) 54a (citing *Saucier*) & 55a (citing *Malley*). In fact, the District Court, which Evanson and the *amicus curiae* laud as following the correct analysis, *see* Petition at 10, also cited many of the same cases and recognized the interplay between summary judgment and qualified immunity as discussed above. Relying on *Wilson*, the District Court explained that its task was to "arrange the facts in a light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute the deprivation of a right." Pet.Appx. at 127a (quoting *Wilson*, 212 F.3d at 786).

There is no dispute among courts regarding the proper standard to apply when determining qualified immunity at summary judgment. The Court of Appeals articulated and followed the correct analysis by assessing whether a reasonable police officer could have found probable cause to arrest Reedy when the facts were viewed in her favor. It faulted the District Court not for using the wrong legal standard, but for misapplying that standard. *Id.* at 36a (explaining that the District Court "failed to consistently interpret the record in the light most favorable to Reedy and instead, contrary to the summary judgment standard, occasionally adopted interpretations that were least favorable to [her]").

Because the necessary legal inquiry is not truly in dispute, the motive behind the arguments of Evanson and the *amicus curiae* becomes clear: they are unhappy with the results of the Court of Appeals' analysis, not the analytical approach itself. *See* Petition at 10-21.

Under such circumstances, this Court should not grant the Petition. Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

II. THE COURT OF APPEALS NEVER HELD THAT QUALIFIED IMMUNITY SHOULD BE RESTRICTED TO SITUATIONS REQUIRING DIFFICULT, SPLIT-SECOND DECISIONS.

Evanson indicates that he believes that the Court of Appeals erroneously limited the application of qualified immunity to situations "requiring difficult, split-second decisions." Petition at i (listing the Questions Presented in the instant Petition). Although he never separately argues such in the Petition, he does, during the argument regarding the interplay between summary judgment and qualified immunity, briefly state, "[T]he Court of Appeals offered no acceptable justification for its unique view that qualified immunity was unavailable to [him], because 'qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions,' and no such situation existed in this case." *Id.* at 13 (quoting Pet.Appx. at 56a n. 37). To the extent Evanson has properly advanced this argument for the Court's consideration, it should not serve as a basis for granting the Petition.

The Court of Appeals never, as Evanson implies, stated that qualified immunity could only exist when difficult, split-second decisions were made. By its plain meaning, the Court of Appeals' language merely

describes one of the rationales for the existence of the qualified immunity doctrine. *See* Pet.Appx. at 56a n. 37 ("qualified immunity exists, in part, to . . . ."). The Court of Appeals' correctly noted that rationale. *See Gilles v. Davis*, 427 F.3d 197, 207 (3d Cir. 2005) (explaining that qualified immunity affords police officers "a certain amount of deference" because "[t]hey must make 'split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving'" (citation omitted)). Nonetheless, the Court of Appeals explained that it reached its conclusion, not on the lack of a split-second judgment, but because "'no reasonably competent officer would have concluded that a warrant should issue' when it did for [Reedy's] arrest[,]" Pet.Appx. at 55a-56a (citation omitted).

Accordingly, there is no merit to the contention that the opinion of the Court of Appeals limited the application of qualified immunity to those situations where law enforcement personnel must make difficult, time sensitive decisions. To the extent Evanson actually advances such an argument, it does not support granting the Petition here.

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT EVANSON WAS NOT ENTITLED TO SUMMARY JUDGMENT FOR THE WARRANTLESS SEARCH OF REEDY'S BLOOD.

Before the Court of Appeals, Reedy argued that the District Court had wrongly concluded that Evanson "conducted an unreasonable, warrantless search of her blood by ordering the drug screening." Pet.Appx. at 57a.

In response, Evanson did "not argue that he had a warrant to search [the] blood, but rather argue[d] that Reedy consented to the search, or alternatively, that she had no reasonable expectation of privacy in her blood because it had left her body." *Id.* The Court of Appeals, noting that "the issue [wa]s that [Evanson] had conducted a warrantless search[,]" *id.* at 57a n. 39, determined that a right of privacy clearly existed, *id.* at 57a-71a, and that, relying on *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Ferguson v. City of Charleston*, 308 F.3d 380 (4th Cir. 2002), Reedy had not consented to the testing because she did not understand, at the time her blood was taken for the "rape kit," that it could be "tested for the law enforcement purpose of obtaining incriminating evidence against her[,]" Pet.Appx. at 70a.

Evanson now contends, without significant analysis or argument, that the Court of Appeals' handling of the "blood test claim" is contrary to this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), and the Court of Appeals' own decision in *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000). Petition at 22. According to Evanson, "[t]he collection and use of blood samples by the police without a warrant has been upheld for decades. . . . [and t]he tests must be reasonable and conducted within a reasonable amount of time." *Id.* In addition, Evanson baldly asserts that the consent forms that Reedy signed at the hospital "were broad enough to permit [him] to ask for additional testing of the blood sample that was given to the police." *Id.* Those arguments fail to demonstrate compelling reasons to grant the Petition.

In *Schmerber*, this Court permitted the warrantless blood draw and testing of an individual suspected of driving under the influence of alcohol. 384 U.S. at 758, 771-72. The Court noted, however, that blood "testing procedures plainly constitute searches[,]" *id.* at 767, that "warrants are ordinarily required for searches . . . and, absent an emergency, no less could be required where intrusions of the body are concerned[,]" *id.* at 770. Only because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops" did this Court determine that an emergency situation existed and that, consequently, a warrant need not have been obtained in that case. *Id.* at 770-71. This Court's holding was specifically limited to the facts before it. *Id.* at 772. Relying on *Schmerber*, the Court of Appeals in *Hedges* also found no constitutional infirmity for a blood-alcohol test. 204 F.3d at 120.

Accordingly, *Schmerber* and *Hedges* stand for the proposition that a right of privacy exists not only in the drawing of one's blood, but also its testing, and that a warrant to do either must issue absent exceptional circumstances. Evanson makes no argument that the emergency concerns of *Schmerber* and *Hedges* exist in this case. Reedy's blood had already been drawn as part of a "rape kit" and thus was preserved. Pet.Appx. at 9a. Nothing prevented Evanson from seeking a warrant for the blood's testing.[4] Thus, the Court of Appeals decision is not in contravention of the *Schmerber* or *Hedges* opinions.

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4. Indeed, Evanson successfully sought and obtained a warrant for the Reedy's medical records, which contained the results of the toxicology exams he ordered. Pet.Appx. at 9a.

Evanson has also failed to demonstrate that the Court of Appeals improperly determined that Reedy did not consent to the blood testing. Indeed, he has not attempted to explain the way in which the Court of Appeals wrongly concluded that the consent forms did not authorize the testing done. He merely asserts, without citation, that the "Court of Appeals' reliance on the *Ferguson* cases is misplaced . . . [because t]hose cases did not involve fluid samples given to the police and consent forms broadly authorizing testing of those samples." Petition at 22. Notably, the instant matter also "did not involve fluid samples given to the police." Reedy's blood was drawn by the hospital, tested at Evanson's order by the hospital, and the results of that testing were later obtained by Evanson from the hospital. Pet.Appx. at 9a. Accordingly, Evanson has done nothing but misrepresent the record to show that the Court of Appeals incorrectly determined that Reedy failed to consent to having her blood tested.

As a result, the Court of Appeals handling of the "blood test claim[,]" Petition at 22, provides no basis for this Court granting the Petition. Evanson has not shown any compelling reason for doing so.

CONCLUSION

For all of the foregoing, Evanson and the *amicus curiae* have not established any compelling reasons for this Court to grant the Petition. Therefore, Reedy respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 10-701

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IN THE
Supreme Court of the United States

FRANK S. EVANSON, individually and in his official capacity as a police officer of the Township of Cranberry,

Petitioner,

v.

SARA R. REEDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI FILED BY AMICUS CURIAE, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Pennsylvania State Association of Township Supervisors ("PSATS") was formed by the Pennsylvania legislature, by authority of section 1402 of the Second Class Township Code, 53 P.S. §66402, for the purpose of addressing issues and subjects relative to the duties of elected and appointed township officials and the improvement of township government. The mission of PSATS is to preserve and strengthen township government and to secure greater visibility and involvement for townships in the state and federal political arenas. In the instant matter, PSATS is interested in ensuring that the defense of qualified immunity for governmental officials is maintained by the proper analytical standard and is applied in a uniform and definable manner.[1]

All counsel of record have received timely notice of the intent to file this Brief and consent was granted.

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[1] In accordance with Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for PSATS hereby confirms that no counsel for any party in the instant action authored this brief in whole or in part, nor did counsel for any party make a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The defense of qualified immunity for governmental officials is a time-honored and integral part of the American judicial system. Consistent application of the defense at the earliest stage of litigation protects the public treasury from unwarranted costs and allows governmental officials to concentrate their resources on serving the public rather then defending unnecessary litigation. Certainty in the guidelines provided in applying qualified immunity allows governmental officials to exercise their authority without fear of reprisal except in the most egregious of circumstances. At the same time, individuals are entitled to be free of impingement on their civil rights. These two legitimate societal interests frequently encroach upon each other's boundaries. It is critically important that court decisions addressing the delicate balance between these two tenets be consistent and reliable so that all concerned, government entities, government officials and individual citizens, understand where the lines are drawn so that each can act with due respect to each other's rights and defenses.

In this case, the Court of Appeals has blurred the lines between these two legitimate interests and misapplied the guidelines established by this Court for analyzing when qualified immunity is to be available in a section 1983 action. The Court of Appeals has gone too far in

finding that all alleged facts are to be viewed from the perspective of the complaining party and either ignoring or dismissing facts that support the police officer's actions. In doing so, the Court of Appeals has created confusion as to the appropriate standard for judging the behavior of police officers in performing their daily duties.

Unless this error is corrected and the case is restored to the established guidelines set forth by this Court in numerous precedents, the proper performance of police officers in performing their duties may very well be unduly stifled. Holding police officers to a higher standard of care than required by previous cases allowing for qualified immunity could result in inadequate enforcement of the laws of the land and may precipitate the imposition of unwarranted liability upon municipal government. Further, governmental entities and officials in general may find themselves spending inordinate amounts of time preparing for and attending trials where the claim should have been disposed of at the early stages of litigation.

Review of the Court of Appeals decision is important to ensure that there remains consistency and predictability in application of the defense of qualified immunity at the earliest stage possible so that governmental officials can perform their duties without fear of liability, absent malice or egregious infringement on clear constitutional rights.

ARGUMENT

Consistent application of the standard for determining qualified immunity for government officials by the courts is essential to providing the proper guidance to those who are tasked with service to the citizens of this country. Departure from established guidelines has the potential to subject those who we entrust with protecting our rights and enforcing our laws to unwarranted liability and uncertainty in the fulfillment of our civil servants' daily duties. Governmental entities, especially those at the local level, rely on a consistent application of qualified immunity for their employees so that they can allocate their scarce resources to serving their citizens rather than wasting time, energy and funds in defending unwarranted and extensive litigation. The result of narrowing the application of the defense of qualified immunity will have not only the direct effect on municipal governments in using public funds to defend claims against their employees, but also the indirect effect of lost time of government employees in participating in the preparation for and attending proceedings often involved in a lengthy trial.

The principle of qualified immunity for governmental officials is deeply ingrained into our judicial system. The application of this principle is necessary for the protection of the men and women

who provide service to others in all branches of government. A fair and even application of the defense of qualified immunity is essential to a fair balance of protecting individual civil rights and the need for aggressive enforcement of the laws and regulations throughout our country. Individual citizens have the right to proper redress when their rights are infringed. It is equally important to protect governmental officials from liability resulting from their official actions unless the actions are patently malicious or knowingly illegal under the circumstances.

The United States Supreme Court has repeatedly recognized the need for immunity for governmental officials. "[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).[2]

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[2] The Court in *Harlow* discussed the distinctions between absolute immunity and qualified immunity and provided guidance on which type would apply in the context of executive officials. There is no dispute that the instant case involves application of qualified immunity and the standards for analyzing its application in the context of a police officer's actions in obtaining an arrest warrant

A necessary aspect of the protection afforded to governmental officials through qualified immunity is a rational consistency in the rulings on cases in which the balance between protecting civil rights and enforcing laws is in question. Discrepancies in the application of established principles serve only to make those charged with providing protection for the citizens unnecessarily question their actions. Inconsistent decisions by the courts cause confusion and uncertainty in the individuals who are assigned to provide the protection to the citizens. It is critically important, therefore, that individual cases uniformly apply the standards set by this Court. The decision of the Court of Appeals in the instant case requires review by this Court because it detracts from that uniformity.

Inconsistent decisions can also cause police officers, police departments, and governmental officials in general to spend inordinate amounts of time preparing for and attending trials where the complaint should have been disposed of by summary judgment or other proceeding early on in the litigation process. The result of failure to properly apply the defense of qualified immunity at the earliest possible time would be that there will be less time for government officials to deal with important governmental functions. It is not in the best interests of the public at large for law enforcement and other public officials to spend time

preparing for and attending trials when the matter should have been resolved by summary judgment.

The discrepancies of the Court of Appeals decision in the instant case have been clearly spelled out by the Petitioner in his Petition for Writ of Certiorari and Amicus herein fully supports the Petition and reasoning of the Petitioner. A brief expansion on that reasoning will be discussed below. It is the very nature of the Court of Appeals anomalous ruling that should cause this Court to grant the Petition in order to both correct the application of the standard for qualified immunity in the case and to provide clarity for future similar cases involving a police officer's analysis of the known facts of a case. Such clarification will provide certainty to such officers and other government officials and allow them to vigorously exercise their authority without fear of undue reprisal.

Qualified immunity is not merely a defense to actions brought by those who believe they have been wronged by those acting under color of state law. Rather, it is at the very heart of necessary protections offered to government officials to allow them the freedom to perform their governmental function.

> Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511,

> 526 (1985). The privilege is "an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.*"

Saucer v. Katz, 533 U.S. 194, 200-201 (2001) (emphasis in original). Therefore, it is important that the application of qualified immunity be determined not only at an early stage of litigation, but also that it be determined on a consistent basis in line with established guidelines. By necessity, this warrants a review at the earliest possible stage of litigation, which often results in determinations being made at summary judgment proceedings.

The application of the rules established for determining if summary judgment is appropriate may, at times, seem to conflict with the principles established for application of qualified immunity. However, a fair and appropriate balance between these two standards is necessary to properly determine if any particular case should proceed to trial. The Court of Appeals in the instant case has drifted so far from the established principles and this proper balance that review of the decision by this Court is required.

The U.S. Supreme Court articulated the modern-day standard for qualified immunity for police officers in the context of section 1983 cases in

the case of *Malley v. Briggs*, 475 U.S. 335 (1986). In this case, the Court recited the "objective reasonableness" standard to determine if an arrest warrant that was alleged to cause an unconstitutional arrest, would result in subjecting the officer to trial. "Defendants [police officers] will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; *but if officers of reasonable competence could disagree on this issue, immunity should be recognized.*" *Id.* at 342 (emphasis added). In further explaining this standard, the Court stated:

> Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*[3] ..., defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application *is so lacking in indicia of probable cause* as to render official belief in its existence unreasonable ... will the shield of immunity be lost." *Malley*, at 344-345, (emphasis added) (internal footnote omitted).

Therefore, in applying the qualified immunity privilege, a court is required to determine if, based upon the information available to an objectively reasonable police officer under the

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[3] *United States v. Leon*, 468 U.S. 897 (1984).

circumstances and at the time an arrest warrant is obtained, that officer could possibly have concluded that probable cause existed to obtain the arrest warrant. If the answer to this question is yes, then qualified immunity attaches and the officer is entitled to judgment in his or her favor on a motion for summary judgment.

Balanced against this rule is the standard for determining if summary judgment is appropriate at the pre-trial stage. Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ. P. 56(c)(2). In doing so, the ruling court is required, for purposes of summary judgment only, to resolve any factual disputes in favor of the non-moving party.

In applying these two legal tenets, it is easy to see that potential conflicts could arise in wading through the allegations set forth by each of the parties. On the one hand, to determine if summary judgment is applicable, the facts are to be viewed in light of the non-moving party, suggesting that the scales are to be tipped in favor of the non-moving party at this stage of the case. On the other hand, to determine if qualified immunity is appropriate, all of the facts as they appeared at the time of the officer's actions must be evaluated to determine if

sufficient facts exist to conclude that an objectively reasonable police officer might find that probable cause to seek the arrest warrant existed.

To resolve this potential conflict, it is necessary to evaluate each case based on all of the facts that were known to the police officer at the time he took action to obtain the arrest warrant. To do this, one must step into the shoes of the police officer at the time that the request for a warrant is made.

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.*, at 818.

Anderson v. Creighton, 483 U.S. 635, 638 (1987).

The Court in *Malley*, *supra*, further instructs that, "if officers of reasonable competence could disagree on this issue [that a warrant should issue], immunity should be recognized." *Id.* at 341. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

Thus, there is the inference in this Court's decisions that police officers are to be given the benefit of the doubt absent evidence of malice or the clear knowing violation of the law. The Court of Appeals in this case, however, did not recognize this benefit of the doubt in favor of officer Evanson. Rather, and without clear justification, it undertook a detailed analysis of the affidavit supplied by the officer to the judge who issued the arrest warrant and then drew practically all inferences against the officer. Even further, rather than stepping into the shoes of the officer, the Court of Appeals took the perspective of the one being arrested. The Court of Appeals readily admits this. "[F]or the reasons described above, it must be said that, *viewing the evidence from Reedy's perspective*, 'no reasonably competent officer would have concluded that a warrant should issue' when it did for her arrest for making a false report of the rape, for theft, and for receiving stolen property." *Reedy v. Evanson*, 615 F.3d 197, 224 (3d Cir. 2010).

This critical error by the Court of Appeals cries out for correction by this Court. Although the standard for summary judgment is to resolve all disputed facts in favor of the non-moving party, this standard does not translate to changing the standard for determining if qualified immunity is applicable. Qualified immunity requires the reviewing court to consider all of the evidence that would be considered by a reasonably competent police officer under the circumstances at the time of

the request for the warrant. Even then, if reasonably competent officers would disagree as to whether such evidence was sufficient, immunity relieves the officer from the litigation.

The Court of Appeals repeatedly refers to information missing from the police officer's affidavit and implies that the officer acted to intentionally omit such information. However, the Court of Appeals fails to recognize the explanations of the officer in his thought process regarding such information. For example, while there were some similarities between the attack on Reedy and the Landmark attack, there were also differences between the two that could easily have led a reasonably competent police officer to conclude that they were not committed by the same person.

The Court of Appeals seems to insert the later confession of the Landmark attacker into the scope of information available to the police officer. However, hindsight in evaluating the officer's actions has been rejected by this Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Graham*, this Court found that, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Although the facts of *Graham* involved an analysis of the use of force by a police officer, which entailed a much shorter window of opportunity to give thought to the circumstances, the reasoning of

the Court in *Graham* is applicable to the instant matter and to all analyses of claims of civil rights actions involving arresting police officers. That is, "the question is whether the officers' actions are 'objectively reasonable' *in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.*" *Id.*

The independent factors of this analysis can easily apply to the instant matter, albeit on a less condensed time frame. The "objectively reasonable officer" standard has been discussed above. Contrary to the Court of Appeals' opinion that the case is to be viewed from the Reedy's perspective, the facts are to be viewed from the perspective of a reasonably competent police officer. Unfortunately, the Court of Appeals only gives lip service to this standard and fails to apply the guidelines set forth by this Court to evaluate the facts from a reasonably objective police officer, not from the perspective of the plaintiff.

In addition, only those facts in dispute are to be resolved in favor of the non-moving party as part of the summary judgment analysis. However, after resolution of those disputed facts, the court was required to then consider and apply all of the facts considered by the police officer. The Court of Appeals, however, chose to discard facts supporting the police officer's actions, including those that were not disputed and that supported the officer's conclusion that the crimes had been committed.

The Court of Appeals did not analyze these facts taking into account the circumstances surrounding the officer's warrant. For example, the officer initially asked the district attorney's office to review a draft of his affidavit. The police officer should be able to rely on the external review and comment to his work. The district attorney's office replied that the affidavit should be revised, which was done by the police officer before submission to the judge. There was no further discussion by the Court of Appeals as to how the affidavit was then revised other than to state that portions of the prior draft were removed. There was also no discussion as to what portions were removed or whether the removed parts were inculpatory, exculpatory or of no consequence.

Another clear example of the Court of Appeals Court's failure to consider the facts and circumstances at the time the warrant was requested is the chronology of events. The Court made much of the fact that the affidavit was filed six months after the investigation began and that in the interim, the police officer learned of the Landmark attack and that the Landmark attack and similar attacks may have corroborated the plaintiff's story. However, the Court did not stop there. It then extrapolated the knowledge of the officer to later events and suggested that such later events should have been known to the police officer at the time of the filing of the affidavit.

The Court noted that discussions involving the Landmark attacker took place several weeks after the affidavit was filed and that the confession from that perpetrator as to the Reedy events did not occur until over eight months after the warrant was issued for Reedy's arrest. The Court later used these facts to support its claim that the police officer was not reasonable in excluding the Landmark facts from his affidavit. The Court of Appeals discussed the reasoning given by Evanson as to his analysis of the consideration of any connection between the Reedy story and the Landmark attack, but then dismissed that analysis out of hand. "Regardless of the credibility of that claimed level of cluelessness[4], the record indicates that Evanson *eventually* did recognize the connection between the two attacks." *Reedy*, at 222 (emphasis added)[5].

It is clear from this fact and others that the Court of Appeals failed to analyze the case from the perspective of a reasonably competent police officer and in light of the facts and circumstances confronting him at the time the affidavit was filed. Rather, the Court included later-discovered facts to reach its conclusion that the police officer did not act as an objectively reasonable officer.

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[4] Evanson testified in his deposition that "the 'only things that could have linked' the two incidents in his mind would have been a confession from the assailant or a DNA match." *Reedy*, at 222.

[5] Upon such recognition, the charges against Reedy were dropped.

Finally, an example of the Court's failure to follow the proper standard involved the Court's repeated statements as to Evanson's motive and intent. This Court has been abundantly clear that lower courts should not consider a defendant's motive or intent when determining whether qualified immunity should protect an official. *See* discussion of *Graham* above. Although the motivation or intent of the police officer is irrelevant, the Court of Appeals used that very factor to somehow conclude that no reasonably competent police officer would have filed the affidavit. Again, the Court of Appeals readily admits this. "We note these post-arrest events not because they figure into an analysis of probable cause at the time the arrest took place but because they may be seen as indicative of Evanson's closed mind throughout the entire set of events, if one views all of the evidence in Reedy's favor." *Id.* at 222 (footnote 34).

This type of conclusion, which is evident throughout the Court of Appeals' decision, even if not overtly stated, deserves review by this Court for two reasons. First, the intent or motivation of Evanson is irrelevant in applying the objectively reasonable police officer standard for qualified immunity. The standard is an objectively reasonable police officer in light of the circumstances at the time the warrant is issued, not any wrongful motivation of the particular police officer. Second, the standard does not require that

all evidence is to be viewed in favor of the plaintiff. Only those facts that are in dispute are to be resolved in favor of the non-moving party as part of the summary judgment analysis. Once those disputed facts are resolved in favor of the non-moving party, they are then added to all other facts – both those in favor of the moving party (if undisputed) and those in favor of the non-moving party to determine if qualified immunity is available.

This is the type of analysis that the Western District Court undertook when it reviewed each of the statements in the police officer's affidavit, compared them with the objectively determined facts of the case, revised the affidavit to correct relevant incorrect or incomplete facts and then analyzed the revised affidavit based on the reasonably competent police officer standard. This "corrective affidavit" approach logically follows the dictates of this Court in reviewing such cases.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review and correct the misapplication of the principles of qualified immunity of governmental officials. It matters not whether the police officer acts under exigent circumstances or whether the officer has the luxury of time in making decisions. A review by this Court

will provide certainty in the qualified immunity analysis. This will benefit those whom the qualified immunity standard is intended to protect while addressing the proper balance between the defense of qualified immunity and providing a proper forum for clearly wronged individuals for redress. More importantly, it will ensure that governmental agencies and officers are all guided by unified principles in performing their duties without unnecessary fear of reprisal, unintended use of public funds and resources, and wasting time and effort in preparing for and attending to unwarranted trials.

Respectfully submitted,

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FRANK S. EVANSON, individually and in his official capacity as a police officer of the Township of Cranberry,

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SARA R. REEDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Petitioner Frank Evanson respectfully submits the following points in reply to respondent Sara Reedy's brief in opposition to Evanson's certiorari petition.

1. Reedy's counterstatement of the case reflects the one-sided, "deliberately slanted" (Appendix A at 31a n. 24) view of the facts that led the Court of Appeals to depart completely and unjustifiably from established law. Instead of viewing the facts known to Evanson from the objective perspective of a reasonable police officer to determine the existence of probable cause and qualified immunity, as cases decided by this Court and prior cases decided by the Court of Appeals require, Reedy's brief in opposition, like the Court of Appeals' opinion, states the case and interprets the conclusions which may be drawn from those facts solely from Reedy's own, diametrically opposed perspective. That approach dramatically reverses the approach applied under established law and forecloses the grant of summary judgment whenever the arrestee's view of the facts differs, as it usually does, from the view of an objectively reasonable arresting officer, thus requiring this Court's intervention.

2. Reedy's argument further demonstrates that this Court should grant Evanson's petition for certiorari.

As Evanson's petition discussed, consideration of an arresting officer's motion for summary judgment under established law hitherto has involved a two-step process. First, the court determines the historical facts known to the officer by viewing the evidence in the light most favorable to the arrestee. In the second step, the court

determines the existence of probable cause or qualified immunity by interpreting the conclusions which could be drawn from those historical facts from the perspective of a reasonable investigating police officer, not by judging the significance of those facts in the light most favorable to the arrestee. This is precisely what the Court of Appeals has done, quite purposefully, in its reported opinion.

Reedy's argument mistakenly recasts Evanson's position as one asserting that the determination of the historical facts is never done by viewing the evidence in the light most favorable to the arrestee. (Br. Opp., p. 12-15.) However, beyond that unavailing distraction, Reedy's argument actually, albeit inadvertently, reinforces Evanson's position and destroys the Court of Appeals' analytical approach.

On that crucial point, Reedy's case-law discussion quotes prior opinions demonstrating the accepted application of the two-step process as recognized by the Court of Appeals in *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788-790 (3d Cir. 2000): "that '[i]n addressing a motion for summary judgment, **the facts must be viewed in the light most favorable to [the non-moving party], and she is entitled to every reasonable inference that can be drawn from the record"** *and that after"[v]iewing the facts in the light most favorable to [the non-moving party]...[,t]he question therefore becomes* **whether a reasonable person in [the officer's] position could have concluded, based on this knowledge, that [the non-moving party] had committed a crime***[.]*" (Br. Opp. p. 12; italics added; otherwise as provided in Reedy's brief.)

Reedy's brief also quotes the two-step process as recognized by the Court of Appeals in *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000), "that in an unlawful arrest case, **when deciding whether qualified immunity applies at summary judgment, courts 'arrange the facts in the light most favorable to the plaintiff, *and then* determine whether, given precedent, those 'facts,' if true, would constitute a deprivation of a right[.]'"** (Br. Opp., p. 14; emphasis and brackets added.)

Reedy's case-law discussion also mentions other cases that employ the two-step process from which the Court of Appeals departed, such as *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) (facts as alleged by plaintiffs and actions that a reasonable officer could have believed lawful) [Br. Opp., p. 14]; *Reardon v. Wroan*, 811 F.2d 1025, 1030 (7th Cir. 1987) (facts viewed favorably to plaintiff and objective reasonableness) [Br. Opp., p. 15].

Additionally, Reedy's brief mentions (and chastises Evanson for not citing) *Scott v. Harris*, 550 U.S. 372 (2007), with respect to adopting the plaintiff's version of the facts as the "first step" in assessing the constitutionality of the officer's actions. (Br. Opp., p. 13-14; citing *Scott*, 550 U.S. at 378.) Tellingly, however, Reedy's brief fails to mention that the **second step** outlined and undertaken in *Scott* was to determine the objective reasonableness of the officer's actions as a matter of law, not as a question of fact for the jury, as the Court of Appeals did in this case. *Scott*, 550 U.S. at 381 text and n. 8 ("Justice Stevens incorrectly declares this to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' **At the summary judgment stage, however, once we have determined the relevant set of facts and**

drawn all inferences in favor of the nonmoving party to the extent supportable by the record, see Part III-A, *supra*, **the reasonableness of Scott's actions**--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' --**is a pure question of law.**") (citations omitted; emphasis added).

3. Contrary to Reedy's brief, the Court of Appeals' opinion unquestionably justified its denial of qualified immunity to Evanson based on its unique and mistaken view that qualified immunity was unavailable to Evanson, because "qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions," and no such situation existed in this case. Appendix A at 56a n. 37.

4. As to Reedy's Fourth Amendment blood-test claim, Reedy's brief, like the Court of Appeals' opinion, overlooks the fact that Reedy did not question the legality of the drawing of her blood sample or the legality of the warrant under which Evanson obtained the test results along with Reedy's other hospital records.

Moreover, Reedy's brief and the Court of Appeals' opinion also ignore the critical fact that Reedy willingly gave the blood sample for police use, and the plain language of consent forms willingly signed by Reedy, which not only allowed her blood to be drawn and tested by the hospital, and but also allowed the blood sample and test results to be furnished to the police.

By asking the hospital to perform a drug-screen on the blood sample that Reedy gave to the police for their use, Evanson did not infringe Reedy's privacy or her Fourth Amendment rights as a matter of established law.

This Court should grant Evanson's petition for writ of certiorari, vacate the Court of Appeals' decision as to Evanson, and reverse the Court of Appeals' judgment against him.

Respectfully submitted,

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